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Supreme Court of the United States

OCTOBER TERM 1967

BREGMAN, VOCCO AND CONN, INC.,
Petitioner,

—against—

DONALDSON PUBLISHING CO.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FREDERICK W. R. PRIDE
LEO P. LARKIN, JR.
GUY C. QUINLAN
200 Park Avenue
New York, New York 10017

MAX CHOPNICK
9 East 46th Street
New York, New York 10017
Attorneys for Petitioner
Bregman, Vocco and Conn, Inc.

ROYALL, KOEGEL, ROGERS & WELLS
CONNER & CHOPNICK
JEROME E. MALINO
THEODORE R. JACKSON
Of Counsel

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BREGMAN, VOCCO AND CONN, INC.,
Petitioner,

—*against*—

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which was entered in this action on March 24, 1967.

CITATIONS TO OPINIONS BELOW

The findings of fact and conclusions of law of the United States District Court for the Southern District of New York are reported at 253 F. Supp. 841 (S. D. N. Y. 1965) and are reprinted in Appendix A, pp. 1a-8a.

The opinion and judgment of the United States Court of Appeals for the Second Circuit are reported at 375 F. 2d 639 (2d Cir. 1967) and are reprinted in Appendix B, pp. 9a-17a.

The unreported memoranda of the Court of Appeals denying the petition for rehearing and for rehearing *en banc* are reprinted in Appendix C, pp. 18a-19a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 24, 1967. On April 7, 1967, Petitioner's motion to extend the time for filing a petition for rehearing was granted. On April 25, 1967, a timely petition for rehearing and for rehearing *en banc* was filed and, on July 5, 1967, was denied. The Order of Reversal and Remand was entered in the District Court on July 11, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals has the power, purportedly exercised in this case, expressly to reject the "clearly erroneous" test prescribed by Rule 52(a) and thus to reverse a decision of the District Court which was amply supported by the evidence and which was based and dependent upon the District Court's evaluation of disputed oral testimony, its interpretation of ambiguous evidence, and inferences drawn by the District Court from evidentiary facts.

2. Whether the Court of Appeals erred in its interpretation of the "employer for hire" provisions of Section 24 of the Copyright Act when it reversed the District Court's decision that one who was (a) the president and a major stockholder and director of Petitioner and (b) contractually obligated to compose songs exclusively for Petitioner and (c) contractually entitled to receive from Petitioner, as compensation, a guaranteed minimum weekly "draw" against specified royalties was an "employee for hire" of Petitioner within the meaning of Section 24.

3. Whether the Court of Appeals erred in holding the "corporate body" provision of Section 24 of the Copyright

Act inapplicable to songs copyrighted by Petitioner, a corporation which was neither the assignee nor licensee of the individual composer, who was Petitioner's president, director, and one of its major stockholders and who composed such songs pursuant to a contract obligating him to compose exclusively for Petitioner for a term of years, and when there was uncontradicted testimony that in the course of such composition the services of other employees of the corporation were also utilized.

FEDERAL STATUTES AND RULES INVOLVED

Involved herein are Federal Rule of Civil Procedure 52(a) and Section 24 of the Copyright Act, 17 U. S. C. § 24. The texts of these provisions, insofar as here relevant, are as follows:

"Rule 52. FINDINGS BY THE COURT

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; * * *. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * * If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. * * *"

COPYRIGHT ACT

"§ 24. *Duration; renewal and extension*

The copyright secured by this title shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the au-

thor's true name or is published anonymously or under an assumed name: *Provided,* That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further,* That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copy-right: *And provided further,* That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication."

STATEMENT OF THE CASE

Procedural History and Issues

This is an action for a judicial declaration as to the ownership of the renewal copyrights to 87 songs ("the songs") composed by Walter Donaldson ("Donaldson") alone or in collaboration with various persons, including persons in Petitioner's employ.* Each of the songs was written while Donaldson was under contract to compose songs "exclusively" for Petitioner, Bregman, Vocco and Conn, Inc. (hereinafter "Petitioner" or "the Corporation") which contract specifically contained the word "employment" in referring to Donaldson's compensation. Each of the songs was copyrighted by Petitioner.

Petitioner made application to the Copyright Office for the renewal and extension of its copyrights in each of the songs, and its applications were duly registered in that Office. Respondent's predecessors in interest also made applications for such renewals and extensions, as the surviving relatives of the deceased composer.

Resolution of the issues here presented was dependent in large part upon an evaluation of disputed oral testimony and other evidence as to the intention and conduct of the parties, as well as inferences drawn from the evidentiary facts.

The first issue was whether, during the period when Donaldson wrote the songs, Petitioner had been his "employer for hire" within the meaning of Section 24 of the Copyright Act. If so, it is conceded that Petitioner was entitled to the renewal rights.

If Petitioner had not been Donaldson's "employer for hire," however, ownership of the renewal rights was de-

*Respondent also seeks an accounting in respect of royalties earned on the songs during the copyright renewal terms.

pendent upon whether Petitioner, when it copyrighted the songs in its own name, had been a "corporate body" which secured the copyrights "otherwise than as assignee or licensee" of Donaldson within the meaning of Section 24. If so, then, even if Petitioner had not been Donaldson's "employer for hire," it was nevertheless entitled to the renewal rights.

Only if both issues were resolved adversely to Petitioner would the renewal rights belong to Respondent.

After a trial on the merits the District Court found that Donaldson intended to become Petitioner's employee, and that Petitioner had been Donaldson's "employer for hire" during the relevant period and therefore owned the renewal rights to the songs. Since this holding was viewed as dispositive, the District Court made no factual or legal determination with respect to the "corporate body" issue.

The Court of Appeals set aside the findings of the District Court, substituted new findings of its own, and, on the basis of those findings, reversed the District Court's decision. As its opinion makes clear, the Court of Appeals did not hold that the District Court's findings were "clearly erroneous" nor did it hold that the issues were confined to questions of law. Rather, its reversal was based on a review *de novo* of the entire record, including the oral testimony of witnesses whose credibility had been challenged at trial, and on new determinative findings of fact directly contrary to the findings basic to the District Court's holding. The Court of Appeals further summarily and without explanation held that the "corporate body" provision of Section 24 of the Copyright Act was inapplicable.

The Court of Appeals solved the threshold problem of the "clearly erroneous" test of Rule 52(a) simply by rejecting the mandate of the Rule:

> "We may say by way of preface to our opinion on the merits that we do not consider ourselves

bound in this case by the 'unless clearly erroneous' test of Federal Rule 52(a) with respect to the trial court's determination that Donaldson was an employee for hire. See *Mamiye Bros.* v. *Barber SS. Lines, Inc.*, 360 F. 2d 774, 776-778 (2d Cir.), cert. denied, 385 U. S. 835, 87 S. Ct. 80, 17 L. Ed. 2d 70 (1966)."

Apart from the issues on the merits, we submit that this preliminary holding, basic to the Court of Appeals' decision, represents an erroneous and unwarranted encroachment upon the fact-finding prerogatives and responsibilities of trial courts, and thus presents an issue of special importance to orderly appellate practice, generally. In addition to being in conflict with many decisions in other circuits as well as certain decisions of this Court, the holding directly poses this question: Has the Court of Appeals the power to set aside the findings of a District Judge, based in large part upon the credibility of witnesses, when those findings are not held "clearly erroneous" and are amply supported by the evidence?

The Facts

We think that the general importance of the issues here raised to copyright law and to Federal appellate procedure can best be understood against the facts adduced at trial.

Donaldson was a well-known and highly popular songwriter (R. 123).* Walter Douglas ("Douglas") was a businessman active and experienced in the popular music field (R. 196). Mose Gumble ("Gumble") was an agent whose business was to promote the performance and sale of popular music (R. 198-9).

In 1927, Donaldson, Douglas and Gumble decided to form a music-publishing corporation (R. 198). To that

*Citations to "(R.)" are to pages of the certified record.

end, they consulted Nathan Burkan, an attorney with wide experience in the entertainment field (R. 200). Burkan assigned an associate, Charles Schwartz ("Schwartz"), to consult the principals and set up the proposed corporation (R. 201).*

Schwartz prepared a pre-incorporation agreement which, as a result of discussions among Schwartz and the three principals, underwent various revisions (R. 201-2). As finally executed on May 4, 1928, the pre-incorporation agreement** provided, among other things, for the organization of Petitioner, the election of Donaldson as a director and President, and the commitment by Donaldson "to write and compose musical works for the Corporation exclusively, for a period of five years from the date of the incorporation of the Company." (Pl. Exh. 3).*** In consideration of Donaldson's obligations, he was to receive one-third of the entire capital stock of the Corporation, plus specified royalties. Donaldson was also to receive, in the form of a "drawing account against royalties," the fixed amount of $300 per week during the first six months of his *"employment"* [emphasis supplied] and $500 per week during "the balance of the term." The agreement further provided that "The Corporation shall have the right to secure copyright in its name" in all musical works composed by Donaldson during the term of the agreement.

The minutes of the first meeting of the Board of Directors of the Corporation (Def. Exh. A)**** recite that Donaldson acted as Chairman of the meeting and was

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*The Corporation, as originally formed, was named "Donaldson, Douglas & Gumble, Inc." but its name was later changed to "Bregman, Vocco and Conn, Inc." It is the Petitioner in this case.

**The text of the pre-incorporation agreement executed by the three principals (in the respects here pertinent) is reprinted in Appendix D, pp. 20a-23a.

***Citations to "(Pl. Exh.)" are to Plaintiff's Exhibits.

****Citations to "(Def. Exh.)" are to Defendant's Exhibits.

elected President. The Corporation was authorized to enter into a contract with Donaldson embodying the terms set forth in the pre-incorporation agreement. These minutes, specifically mentioning Donaldson's "*employment*," [emphasis supplied] were initialed and signed by him, and are reprinted in Appendix E, pp. 24a-28a.

The contract with Donaldson (Pl. Exh. 4), in the form of a letter agreement accepted by him, incorporated the provisions contained in the pre-incorporation agreement (insofar as they pertained to Donaldson) and included Donaldson's agreement "to write and compose musical works for us [the Corporation] exclusively. . .". It also provided for a fixed drawing account to Donaldson, against royalties of $300 per week during the first six months of Donaldson's "*employment*" [emphasis supplied] and of $500 per week during the balance of the five-year term, and for the right of the Corporation "to secure copyright in our name in all such works." A copy of the letter agreement between Donaldson and Petitioner is reprinted as Appendix F, pp. 29a-31a.*

At the trial, Schwartz testified that he understood the contract between the Corporation and Donaldson to mean that Donaldson was an employee (R. 155); that whatever songs Donaldson composed belonged to the Corporation (R. 156); and that, under the authorities, renewal rights therefore automatically vested in the Corporation, as Donaldson's employer (R. 160, 162). Schwartz also confirmed

*In line with the preincorporation agreement, contracts were also entered into by the Corporation with the other two organizers and stockholders—Douglas and Gumble—providing for their employment by the Corporation (Pl. Exh. 5 and 6). The Court of Appeals adverted to certain differences in the language of their agreements and the agreement with Donaldson, as bearing upon the intention of the parties. Petitioner has urged that the nature of the arrangements with Donaldson must be evaluated on the basis of the evidence bearing upon the agreement with him. Moreover, on the question of the "intention" of the parties, this was plainly a question of fact which was decided by the Trial Court.

testimony given in his deposition four years before the trial that "the parties intended employment" (R. 164). In response to questioning by the trial judge, Schwartz repeated that Donaldson, Douglas and Gumble were "all employees" (R. 167).*

The testimony of Douglas—now deceased, but who, at trial, was the sole survivor of the three original organizers, stockholders and officers of the Corporation—was completely consistent with Schwartz' testimony on this vital point.** Douglas, too, testified that he, Donaldson and Gumble intended Donaldson to be an employee of the Corporation and the Corporation to become the owner of all songs composed by Donaldson during the five-year contractual period (R. 129, 217-8, 370, 373).

Richard Powers, a former agent for the American Society of Composers, Authors and Publishers ("ASCAP") and a long-time friend of Donaldson, testified on deposition that Donaldson considered himself an employee of the Corporation and believed that his musical output during the contractual period belonged to the Corporation (Powers Deposition, pp. 14-15). Powers testified, without contradiction, that Donaldson, in expressing his desire to work for a movie studio in California, had often said "I wish I could get out of my employment contract" and "I can't place my songs anywhere else" (*Ibid.* p. 15).

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*Schwartz admitted that his recollection of much that had transpired so many years before was indistinct but he nevertheless recalled one salient fact—that an employer-employee relationship between the Corporation and Donaldson had been intended.

In a colloquy with the Court, Schwartz would not commit himself as to the legal significance of the agreement with Donaldson, as actually executed, in respect of Donaldson's status. The record makes clear, however, that he took this position because he regarded this issue as the ultimate question to be resolved by the Court (R. 159).

**Douglas was a wholly disinterested witness. At the time of the trial, he had no interest, direct or indirect, in Petitioner (R. 283).

Donaldson's contract did not require him to keep fixed hours or to work under the supervision of others. He was himself the President of the Corporation (R. 203-4), and was provided by it with an office, a piano (R. 209) and the services of arrangers and others admittedly employed by the Corporation (R. 253). During the initial years of the contract term, at least, Donaldson worked reasonably regular hours in the corporate offices (R. 219).

Donaldson did not always compose alone. He often worked in collaboration with arrangers and others in the Corporation's employ. Douglas testified:

> "He would try and work that out first, and then he would try to set a lyric to it, if he were doing it himself, or if he couldn't make the grade himself, a lyric writer would take ahold of it at that point and try to—
>
> "Q. What did you do about the music itself? How did he note the music? A. Well, he would play the notes on the piano. Harry Tiedeman [an employee of the Corporation] would take them down as he went along and from that a lead sheet would be made. From that the base would be filled in and then—
>
> "Q. Who would fill in the base? A. Tiedeman.
>
> "Q. Who would do the arranging? A. The original piano copy was usually made by Tiedeman unless it was a song that had very unusual rhythms or something that required special treatment. The dance arrangement would be made by a dance arranger and the vocals would be made by a vocal arranger and the band arrangements would be made by a bandman, and there were different arrangers for different types of publications.

"Q. Who would pay for the services of these people who did these arrangings? A. The publisher.

"Q. Donaldson, Douglas & Gumble? A. That's right.

"Q. When Mr. Donaldson was out of New York, did he also use an arranger? A. Yes.

"Q. Was that an arranger paid by Donaldson, Douglas & Gumble? A. Surely." (R. 254-6)

There is no evidence in the record that Donaldson purported to reserve to himself any proprietary rights in the songs which he composed or that he ever during his lifetime claimed any such rights. To the contrary, the Corporation, without objection by Donaldson, secured the copyrights to each of the songs in its own name (R. 234), and its rights were never challenged by anyone.

During the term of his employment, Donaldson composed for no one other than the Corporation, except by arrangement with and for the benefit of the Corporation (R. 233). Such arrangements included contracts with the outstanding producer, Florenz Ziegfeld, and Fox Film Corporation for the "loaning" or "farming out" of Donaldson's services in connection with specific projects.

Thus, when Ziegfeld proposed to engage Donaldson to write the musical score for the stage production "Whoopee", it was Douglas, and not Donaldson, who negotiated the arrangements (R. 212). And when Donaldson's services were made available to Fox Film Corporation for a twelve-week period, it was again Douglas who effected the arrangements (R. 227-8). Indeed, Petitioner was a party to the Fox contract, which expressly provided that the Corporation consented to the arrangements involving Donaldson and one Leslie, *"who are now in* [the Corporation's] *employ"* (Def. Exh. EE). [Emphasis supplied] Fox, under the terms of the contract, acquired the motion-picture rights

to the songs which Donaldson wrote while "loaned out," but the contract provided that, except for such rights, the Corporation would own the copyrights and the songs themselves "without reservation, condition or limitation."

Douglas testified that such arrangements, then as now, conformed to accepted usage and custom in the music and entertainment industry (R. 233-5). The Corporation, recognizing the commercial value of owning songs which were popularized in successful Broadway productions and motion pictures, encouraged Donaldson's participation in such special projects, and permitted him to retain the payments made by the producers therefor (R. 234-5). As noted, the Corporation did in fact copyright, as proprietor, all songs so composed by Donaldson during the five-year employment term and the Corporation's copyrights to such songs added significantly to its publication, licensing and other revenues.*

For the first 3½ years of the term of Donaldson's contract, the Corporation paid to him or for his account $300 per week (R. 238-9). Donaldson's contract provided that for three of these years he was to have been paid $500 per week; but this increase over the original $300 was not paid or credited because Donaldson's actual drawings not only exceeded the stipulated compensation, but the royalties owed to him under his contract, as well (R. 232).

In summary, for the first six months of the contract, Donaldson was to be paid $300 per week—a total of $7,800. For the next four and one-half years, he was to be paid

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*In the light of the undisputed evidence regarding these outside "engagements" of Donaldson, we believe the Court of Appeals misconstrued their significance. It pointed to them as indicating that Donaldson was "free" to accept outside employment and thus was not an employee. The Court thereby overlooked or ignored the uncontradicted evidence that, in the few instances in which Donaldson engaged in such activities, it was always with the Corporation's consent, and through arrangements made by Douglas on behalf of the Corporation.

$500 per week—a total of $117,000. Thus, his total minimum compensation was to be $124,800. During the contract term, the Corporation paid $180,268.09 to Donaldson or for his account (Exh. 11-9). In short, Donaldson was paid more than $55,000 over the contractual weekly compensation. Also the payments to Donaldson exceeded by $12,000 the combined compensation he was to receive from both his drawing account and royalties.

In the light of the circumstance that Donaldson was indebted to Petitioner for payments in excess of the amounts to which he was entitled as royalties, Donaldson's co-stockholders negotiated with him for the termination of their arrangements and the relinquishment of his stock, in exchange for a release by the Corporation of any claim to the excess payments (R. 243). Donaldson, and later his estate, of course, continued to receive from the Corporation the royalties to which he was entitled in respect of the compositions theretofore written.

REASONS FOR GRANTING THE WRIT

The Importance of the Issues Generally

The decision of the Court of Appeals patently affects the rights of the parties to many thousands of dollars of past and future royalties earned and to be earned by the songs.

But we recognize that this consequence, standing alone, would not warrant the granting of this petition, however erroneous the judgment below may have been on the merits. We urge, however, that the Court of Appeals' decision constitutes a precedent of far-reaching significance under the Copyright Law which should be reviewed by this Court. The "employment for hire" doctrine of the Copyright Act, 17 U. S. C. § 24, is the basis on which an incalculable number of copyrights and copyright renewals in literary, musical and other copyrightable works have been claimed and regis-

tered by literally thousands of corporations.* It will continue to be of great importance if the Copyright Revision Statute, recently passed by the House of Representatives, is enacted into law, since the "Works Made For Hire" language is carried forward in the new statute. *See, e.g.*, H. R. 2512 § 201(b).** Yet this Court has not spoken as to the meaning of the "employer for hire" concept as used in the Copyright Act.

The holding below, in which the Court of Appeals apparently applied the criteria of a routine master-servant relationship to employment involving the creation and ownership of artistic works, necessarily creates unsettling doubts as to existing and future copyright and renewal rights and directly affects a vast number of publishers of literary, musical and other copyrightable material, who claim such rights in reliance on the "employment for hire" provision of Section 24. A review of that holding by this Court is therefore of the utmost significance.

Inasmuch as the question of a corporation's ownership of the copyrights and renewals of copyrights to works written for it has generally been determined by the "employer for hire" doctrine, the so-called "corporate body" provision of Section 24 has received little authoritative attention. But if the Court of Appeals here correctly held that an organizer, officer, director and stockholder of a corporation who was employed by that corporation, not only as president, but to write songs for it exclusively, is not an "em-

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*A survey made in the first half of 1955 has indicated that corporate claims to copyrights account for almost 40% of copyrighted works generally. *Howell's Copyright Law*, p. 53 (Rev. Ed., 1962).

**Section 201(b) provides: "Works Made For Hire.—In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright."

ployee for hire" within the meaning of the Copyright Act, then the "corporate body" provision of the Act assumes a much greater significance. Moreover, this issue, too, will have continuing importance if the general Copyright Revision Statute is enacted into law. For the "corporate body" language of the existing law has been incorporated in the proposed statute. *See, e.g.*, H. R. 2512, § 304(a).

The precise intent of the Congress in enacting the "corporate body" provision of the Act has never been entirely clear, and few authorities have attempted to explain its meaning. Here the Court of Appeals summarily stated that the "corporate body" provision "does not apply to the facts of this case." But the Court failed to explain its cursory disposition of the issue, saying, simply, that the provision was "infrequently invoked", "limited in scope", and "not entirely plain." These observations, however, do not justify the conclusion that the Court of Appeals has the right or power to render the statute nugatory nor to assert that is meaningless. Nor do they give any indication of why the act is not applicable here. We believe that this Court should provide the publishing industry, generally, with a definitive interpretation of the "corporate body" provision of Section 24.

But the importance of the Court of Appeals' decision transcends even the uncertainty its holding has created in the field of copyright law. Application by the Court of Appeals of the "clearly erroneous" test of Rule 52(a) would most surely have required affirmance of the District Court's decision, and the reversal is, as the Court of Appeals itself recognized, predicated on its power to reject the mandate of the Rule. The decision, as we have noted, is in direct conflict with the applicable holdings of this Court and the weight of authority in other circuits. It will stand as a precedent for the power of an appellate court to disregard the Rule and enter upon a *de novo* review of the record in

any case where the Court of Appeals is dissatisfied with the decision of the trier of fact.

In summary, we petition this Court because we earnestly believe that the Court of Appeals' decision exceeded its power under Rule 52(a) and, on the "employment for hire" and "corporate body" issues, represents an erroneous precedent of extreme significance in the field of copyright law.

POINT I

THE REFUSAL OF THE COURT OF APPEALS HERE TO BE BOUND BY RULE 52(a) CONSTITUTED AN ERROR OF GRAVE CONSEQUENCE TO ORDERLY APPELLATE PROCEDURE.

The decision of the Court of Appeals is based squarely upon the premise that "We do not consider ourselves bound in this case by the 'unless clearly erroneous' test of Federal Rule 52(a) with respect to the trial court's determination that Donaldson was an employee for hire." The Court of Appeals was obliged to take this position in order to reverse, since resolution of the issues was based in large part on findings of fact as to the intent and conduct of the parties, and the findings of the trial judge, amply supported by the evidence, were not, and indeed could not have been, held to be "clearly erroneous."*

A. All of the Policy Considerations Underlying Rule 52(a) Require its Application in This Action.

It has long been apparent that the Second Circuit has taken a narrower view of Rule 52(a) than have other Courts of Appeals, and that the limitations engrafted upon the Rule by that Court have been in sharp conflict with

*This was obviously the view of the Court of Appeals. If it had believed that the findings of the District Court were "clearly erroneous," it would simply have so held and there would have been no reason for any pronouncement that it was not bound by the Rule.

other Circuits.* But the decision below goes further than any case with which we are familiar in rejecting the mandate of Rule 52(a) and encroaching upon the fact-finding responsibilities of the trial judge. If the decision below is permitted to stand, its precedent will mean that the Rule for all practical purposes has become a nullity, for the present case involves every policy consideration heretofore advanced in support of the Rule's application.

1. It had previously seemed firmly established by decisions of this Court and of the Second Circuit itself that, under Rule 52(a), it is rarely proper for an appellate tribunal to disturb the findings of the District Court based upon its evaluation of oral testimony and the credibility of witnesses. *See, e.g., United States* v. *Oregon Med. Soc.*, 343 U. S. 326, 399; *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 433 (2d Cir. 1945); *Beggs* v. *Dougherty Overseas, Inc.*, 287 F. 2d 80 (2d Cir. 1961); *Mazzella Blasting Mat. Co.* v. *Vitiello*, 250 F. 2d 935 (2d Cir. 1957); *Lee Dong Sep.* v. *Dulles*, 220 F. 2d 264 (2d Cir. 1955); *Hedger* v. *Reynolds*, 216 F. 2d 202 (2d Cir.

See, e.g., Orvis v. *Higgins*, 180 F. 2d 537, 539 (2d Cir. 1950), *cert. denied*, 340 U. S. 810 (Frank, J.). *Cf. Lundgren* v. *Freeman*, 307 F. 2d 104 (9th Cir. 1962), and authorities cited therein; *Wells* v. *Ruiz*, 372 F. 2d 119 (10th Cir. 1967); *Peoples Bank of Trenton* v. *Saxon*, 373 F. 2d 185 (6th Cir. 1967); *Worthern Bank & Trust Co.* v. *Franklin Life Insurance Co.*, 370 F. 2d 97 (8th Cir. 1966); *Don J. Cummings Co.* v. *Aluminum Manufacturing Corp.*, 371 F. 2d 118 (10th Cir. 1967). The Second Circuit's "gloss" upon Rule 52(a) has been subjected to extensive and severe criticism. *See, e.g.*, Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751, 770 (1957): "That Rule 52 required application of the 'clearly erroneous' test to all findings, regardless of the nature of the evidence, should thus have been apparent to anyone who understands the difference between a hypothetical and a conjunctive proposition." *See, also*, Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 Vand. L. Rev. 493, 505 (1950); Comment, *Scope of Appellate Fact Review Widened*, 2 Stanf. L. Rev. 784 (1950); 2B *Barron & Holtzoff*, § 1132 (Rev. Ed. 1961). *But see* 5 Moore, *Federal Practice*, § 52.04 at 2642.

1954). In this case, however, the Court of Appeals saw fit to reverse, even though it is clear from the District Court's opinion that its findings were based in large part on the oral testimony of Schwartz and Douglas.* And this it did in the face of the emphasis in the Rule itself that in such circumstances particular significance should attach to the findings of the trial court.

2. Nor is this a case where the Second Circuit applied or could have applied its previously announced policy of disregarding oral testimony which it believed in conflict with the documentary evidence. *See, e.g., Orvis* v. *Higgins, supra.* To the contrary, the contemporaneous documents in this record in all respects support the oral testimony of Schwartz and Douglas. For example, the minutes of the first meeting of the Board of Directors refer to Donaldson's status with Petitioner as a "employment" and the agreement with Donaldson also contains a like reference to "employment." The agreement to which Petitioner, Donaldson, and Fox were parties expressly refers to Donaldson as an "employee" of Petitioner. Indeed, the testimony of Schwartz and Douglas that the parties intended Donaldson to be an employee of the Corporation was basically uncontradicted. Yet the Court of Appeals, in reaching its own conclusion as to the meaning of the documentary evidence, disregarded entirely the language of the documents themselves, as well as the unequivocal corroborative testimony of the disinterested trial witnesses.**

*Respondent's arguments, on appeal, consisted largely of challenges to the credibility of these witnesses.

**The Court of Appeals deprecated the obvious importance of the documentary references to Donaldson's "employment" by improvising, without a word of evidentiary support, that the word "employment" was "a shorthand way of saying 'during the period during which you will be writing songs to which the corporation has certain rights and will have certain royalties coming to you from such songs.'" 375 F. 2d at 642.

3. The opportunity of the trial judge to observe the witnesses was especially important in this case, since Schwartz and Douglas testified as to events occurring many years before the trial. Thus the trial judge was obliged to pass not only upon the credibility of the witnesses, but also upon the apparent soundness and reliability of their memories. In such circumstances, the findings of the trial court should be entitled to special weight, and the holding of the Second Circuit to the contrary is in direct conflict with *Egner* v. *E. C. Schirmer Music Co.*, 139 F. 2d 398 (1st Cir. 1943), *cert. denied*, 322 U. S. 730.

Egner was a copyright action involving the well-known song "The Caissons Go Rolling Along." In 1921, the composer, Gruber, granted permission to two individuals, Egner and Mayer, to include the song in a proposed book, and Egner and Mayer thereafter registered a copyright to the song in their own names. The plaintiffs, claiming to be the assignees of Egner and Mayer, sued to restrain the defendant from infringing their copyright. The trial judge found as a fact that Gruber had not assigned his rights in the song to Egner and Mayer but, at most, had granted them a mere license. In refusing to disturb the trial judge's findings, the First Circuit said (139 F. 2d at 399):

> "The plaintiffs attack the findings of fact by the trial court as being contrary to the testimony of Mayer, but it is the function of the finder of fact, in this case the trial judge, to evaluate the testimony. This evaluation involves not only a determination as to the honesty and credibility of the witness, but, in the case of Mayer, as to the soundness of memory of transactions twenty years after the date of their occurrence. We cannot say that the findings of fact by the trial court were clearly erroneous."

B. Nothing in the Record or in the Opinion Below Justifies the Decision of the Second Circuit to Depart From Rule 52(a) and to Refuse to Apply It in This Action.

1. The preemptory refusal of the Second Circuit to apply the "clearly erroneous" test of Rule 52(a) is in no way excused by the lone decision cited in its Opinion, *Mamiye Bros.* v. *Barber Steamship Lines, Inc.*, 360 F. 2d 774 (2d Cir. 1966) *cert. denied*, 385 U. S. 835, or in the authorities there relied upon. *Mamiye* was one of a line of cases in the Second Circuit holding that, in order to assure the application within the Circuit of a uniform concept of "standard of care," the Court of Appeals would undertake a *de novo* review of determination by trial courts on the ultimate issue of negligence, although not of the facts upon which a determination of that issue was based (360 F. 2d 774 at 776).* *See, also, Kane* v. *Branch Motor Express Co.*, 290 F. 2d 503, 506 (2d Cir. 1961); *Verbeeck* v. *Black Diamond SS. Corp.*, 269 F. 2d 680, 687 (2d Cir. 1959), *cert. denied*, 361 U. S. 934. Assuming, *arguendo*, the correctness of this line of cases, the holdings are based squarely on grounds peculiar to the law of negligence, *i.e.*, the alleged inability otherwise to determine whether the trial judge ap-

*In any event, the Second Circuit's exposition in *Mamiye* of the rationale underlying its decisions in other cases involving the applicability of Rule 52(a) was dictum. For the Court in fact, held that the findings of the District Court were not "clearly erroneous," and affirmed.

Hence there can be no implication that this Court, in denying certiorari in *Mamiye*, was indicating any approval of the disregard by an appellate court of the "clearly erroneous" rule, or any approval of the Second Circuit's criticism of the "shackles" of that rule. For in view of the actual decision, the petition in *Mamiye* obviously raised no claim that Rule 52(a) had been disregarded. Rather, this Court was asked to review on the ground that the decision was in conflict with a decision of the Third Circuit, on what were said to be essentially the same facts.

plied, as a matter of law, a proper standard of care (360 F. 2d 774 at 776-777). And the court, in *Mamiye,* expressly recognized that its disregard of Rule 52(a) was confined to this area. But even as so confined, the Second Circuit recognized that, under the decision of this Court in *McAllister* v. *United States,* 348 U. S. 19, it could ignore a finding by the trier of facts only in respect of the legal concept of "standard of care" and not as to findings of fact on the issue of causation. *Mamiye Bros.* v. *Barber, supra,* at 360 F. 2d 777.

2. If, however, the Court of Appeal's cryptic citation of Mamiye is intended to mean that the existence of an employment relationship is not a question of fact, such a holding would represent a new and indefensible extension of the Second Circuit's inroads upon Rule 52(a). It would be in conflict with prior decisions of that Circuit, as well as others, which have applied the Rule to findings on this issue. *Tyler* v. *Lowe,* 138 F. 2d 867 (2d Cir. 1943); *see, also, United States Cartridge Co.* v. *Powell,* 185 F. 2d 67, 71-72 (8th Cir. 1950), *modified on other grounds,* 186 F. 2d 611 (1951), *cert. denied,* 341 U. S. 936; *Sawyer* v. *Crowell Pub. Co.,* 142 F. 2d 497 (2d Cir. 1944), *cert. denied,* 323 U. S. 735. Similarly, Rule 52(a) has been held applicable to other facets of the issue of "employment," such as whether or not "advances" constitute "salary." *Anderson* v. *St. Louis Terminal Warehouse Co.,* 173 F. 2d 436, 439 (6th Cir. 1949).*

*It is, of course, well settled that Rule 52(a) applies to cases arising under the Copyright Act. *See, e.g., William* v. *Kaag Manufacturers, Inc.,* 338 F. 2d 949 (9th Cir. 1964); *Venus Music Corporation* v. *Mills Music,* 261 F. 2d 577 (2d Cir. 1958); *Cholvin* v. *B. O. Music Co.,* 253 F. 2d 102 (7th Cir. 1958). It is equally clear that Rule 52(a) applies to declaratory judgment actions, *Peoples Bank of Trenton* v. *Saxon,* 373 F. 2d 185 (6th Cir. 1967), and to actions involving the interpretation of contracts, *Don J. Cummings Co.* v. *Aluminum Manufacturing Corp.,* 371 F. 2d 118 (10th Cir. 1967).

In the *Sawyer* case, *supra,* a government employee sought to enforce his rights as the registered copyright owner of a map which he had prepared. The point in controversy was whether the employee had prepared the map in the course of his official duties. The trial court found that the map had been so prepared and that the employee therefore held the copyright in trust for the government. The Second Circuit there held that the issue was factual and that the finding of the trial court therefore could not be set aside unless clearly erroneous. We submit that the *Sawyer* case was clearly a correct application of Rule 52(a), and that the Second Circuit's departure from that holding in this case is unwarranted.

3. If the Court of Appeals intended, by citing *Mamiye,* to indicate that Rule 52(a) has no application to inferences drawn by the trial court from evidentiary facts, its holding is in direct conflict with previous decisions of this Court. The applicability of the Rule to such inferences was recognized in the earliest 1938 *Notes to the Rules of Civil Procedure* formulated by the Advisory Committee on Rules of Civil Procedure:

> " . . . The rule stated in the third sentence of *Subdivision (a)* accords with the decisions on the scope of the review in modern federal equity practice. It is applicable to all classes of findings in cases tried without a jury *whether the finding is of a fact concerning which there was conflict of testimony, or of a fact deduced or inferred from uncontradicted testimony.*" [Citations omitted] House Document No. 588, 75th Congress, Third Session. (Emphasis supplied.)

Confirming the view of the Committee, this Court held in *United States* v. *United States Gypsum Co.,* 333 U. S.

364, 394, that Rule 52(a) is applicable to findings based upon "inferences drawn from documents or undisputed facts." That proposition has been confirmed by this Court in *Commissioner* v. *Duberstein*, 363 U. S. 278, where the issue was whether certain property transferred to taxpayers constituted gifts or taxable compensation. In *Duberstein*, the basic evidentiary facts, such as those relating to the transfer of property, previous dealings between the parties, and words spoken and written upon various occasions, were undisputed. This Court nevertheless held that the classification of the transfers as "gifts" or "compensation" was a determination of fact which should not be disturbed on appeal unless clearly erroneous, saying (363 U. S. at 291):

> "[I]t cannot be said that the conclusion of the Tax Court was 'clearly erroneous.' It seems to us plain that as trier of the facts it was warranted in concluding that despite the characterization of the transfer of the Cadillac by the parties and the absence of any obligation, even of a moral nature, to make it, it was at bottom a recompense for Duberstein's past services, or an inducement for him to be of further service in the future. We cannot say with the Court of Appeals that such a conclusion was a 'mere suspicion' on the Tax Court's part. To us it appears based in the sort of informed experience with human affairs that fact-finding tribunals should bring to this task."

4. This Court also held in *Guzman* v. *Pichirilo*, 369 U. S. 698, that findings based upon the interpretation by the trial judge of ambiguous evidence are within the ambit of Rule 52(a):

> "The determination of the factual content of ambiguous testimony is for the trial court, and such determination can be set aside on review only if 'clearly erroneous'." (369 U. S. at 702)

We believe, on the authority of *Guzman*, that the Court of Appeals erred in substituting its interpretation for that of the District Court in respect of the significance and meaning of the intention and conduct of the parties and the documentary evidence.

In summary, the Court of Appeals has announced a rule in this case which, if permitted to stand, will sanction the disregard of Rule 52(a) whenever a Court of Appeals is so-minded and decides to arrogate such power to itself. We submit that sound considerations of policy and of orderly procedure in the Federal courts make it incumbent upon this Court to exercise its supervisory jurisdiction to compel compliance with the Rule in this case.

POINT II

THE COURT OF APPEALS ERRED IN HOLDING THAT DONALDSON WAS NOT AN "EMPLOYEE FOR HIRE" WITHIN THE MEANING OF THE COPYRIGHT ACT.

Apart from its failure to apply Rule 52(a), the Court of Appeals based its finding that Petitioner was not Donaldson's "employer for hire" on what we believe to be an erroneous interpretation of the words of the Copyright Act, in respect of the "works made for hire" and "employer for hire" concepts.

The reasons advanced by the Court of Appeals for holding that Petitioner was not Donaldson's employer for hire, to the extent that they are legal rather than factual, are contrary to established authority. For example, the Court

of Appeals asserted that "the absence of any fixed salary" indicated that Donaldson was not an employee. This observation by the court was plainly at odds with the documentary evidence.* But passing this error (which featured prominently in the decision below), the Court of Appeals ignored, and its conclusion is contrary to, numerous authorities which have held that whether a work was "made for hire" in the sense of the Copyright Act does not depend on whether the individual author worked for a fixed "salary." *Shapiro Bernstein & Co.*, v. *Bryan*, 27 F. Supp. 11 (S. D. N. Y. 1939) (on motion to dismiss); 36 F. Supp. 544 (S. D. N. Y. 1940), *aff'd*, 123 F. 2d 697 (2d Cir. 1941); *Fred Fisher Music Co.* v. *Leo Feist, Inc.*, 55 F. Supp. 359 (S. D. N. Y. 1944); *Tobani* v. *Carl Fischer, Inc.*, 36 U. S. P. Q. 97 (S. D. N. Y. 1937),** *modified on other grounds*, 98 F. 2d 57 (2d Cir. 1938), *cert denied*, 305 U. S. 650. The contractual language pertaining to Donaldson's drawing account is substantially the same as the corresponding contractual provisions in the *Fisher* case, *supra*, where the composer was held to have been an "employee for hire". The arrangements as to compensation in *Shapiro* and *Tobani, supra*, were also similar to those in *Fisher*.

The holding in the *Fisher* case is also in accord with the law of New York, as it has been applied to employment contracts in other fields. *See, e.g., North Western Mutual Life Ins. Co.* v. *Mooney*, 108 NY 118 (1888); *Gray*

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*The Corporation had the unqualified obligation to provide Donaldson with a fixed weekly drawing. The fact that the drawing was not denominated "salary" did not change the nature of the Corporation's obligation.

**It is equally clear under New York law that an employment relationship can exist although compensation is not paid in the form of a fixed "salary". *Hedeman* v. *Fairbanks, Morse & Co.*, 286 N. Y. 240 (1941); *Catalano* v. *J. C. MacElroy Co.*, 13 App. Div. 2d 914 (1st Dept. 1961).

v. *Lurie,* 3 App. Div. 2d 956 (3d Dept. 1957); *Posner* v. *Precision Shapes, Inc.,* 271 App. Div. 435 (1st Dept. 1946). Obviously, the employee status is not affected by the fact that the compensation varies in amount. *Rees* v. *Bank Building and Equipment Corporation,* 32 F. 2d 548 (7th Cir. 1964) *cert. denied* 379 U. S. 932; *Gebhard* v. *Royce Aluminum Corporation,* 296 F. 2d 17 (1st Cir. 1961); *Burnham* v. *Louis Meyer & Son,* 172 F. 2d 84 (2d Cir. 1949); *Catalano* v. *J. C. MacElroy Co.,* 13 App. Div. 2d 914 (1st Dept. 1961).

Moreover, there is no sound basis for holding, as did the Court of Appeals (375 F. 2d at 643), that Donaldson could not have been an employee because Petitioner did not "supervise" or "control" his work during regular working hours, or have the power so to do. Whatever relevance such a test may have as a criterion of employment in other contexts, it is obviously inappropriate as applied to authors, songwriters, and other artists. An employer cannot prescribe the hours when a songwriter employee will become inspired, or compel the composition of songs to order, any more than a corporation can "supervise" its president in the performance of duties based on a talent unique to himself.*

Yet even here the record lends support to the District Court's holding: It shows, for example, that the Corporation provided Donaldson with an office, a piano, and the services of other employees (R. 254-255) and that Donaldson worked reasonably regular hours at the Corporate offices during the early years.

Although concluding, upon its own evaluation of the evidence, that Donaldson was not an "employee for hire," the Court of Appeals failed to indicate the nature of his relationship to the Corporation.

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*In any event, Donaldson as president was the chief executive officer of the Corporation and it would be he who would have the primary authority with respect to the supervision of employees—including himself.

The relationship could not have been that of licensor and licensee. For the Corporation not only registered in its own name the copyrights to all of the songs, but enjoyed all the benefits and revenues derived from the mechanical reproduction, publishing and other rights appurtenant to copyright ownership, including revenue for performing rights from ASCAP (R. 308-9) and others (Exh. 11; see also Exh. G, I, K, M, O, and S). The Corporation not only derived revenues from these rights, but granted such rights to third parties.* These factors are obviously incompatible with the position that the Corporation was a licensee, and there is nothing in the documentary evidence to support the existence of such a relationship.

Indeed, the mere fact that Petitioner had the express right to copyright the songs in its own name is wholly incompatible with a "licensing" arrangement. *See, e.g., David* v. *Dupont de Nemours & Company,* 240 F. Supp. 612 (S. D. N. Y. 1965).

On the other hand, the Court of Appeals' holding (although again at odds with the record) that the Corporation was contractually entitled to the publication and mechanical reproduction rights only is inconsistent with an assignor-assignee relationship. For, normally, an assignee of a copyright enjoys all of the appurtenant privileges. *See PhotoDrama Motion Picture Co.* v. *Social Uplift Film Corp.,* 213 Fed. 374 (S. D. N. Y. 1914), *aff'd* 220 Fed. 448 (2d Cir. 1915); *N. Witmark & Sons* v. *Pastime Amusement Co.,* 298 Fed. 470 (E. D. S. C. 1924), *aff'd,* 2 F. 2d 1020 (4th Cir. 1924); *Houghton Mifflin* v. *Stackpole,* 104 F. 2d 306 (2d Cir. 1939). Moreover, there is nothing in the agreement between Donaldson and the Corporation to indicate that an assignment by Donaldson, or

*For example, the Corporation granted all foreign rights to third parties (Def. Exh. II).

anything comparable to an assignment, was ever contemplated.

The Court of Appeals also appears to have overlooked or ignored the numerous authorities which hold that, when an artistic work is created for pay pursuant to a contract, it is legally presumed that the person who pays receives all rights in the work, except to the extent that those rights are expressly reserved to the creator or released by the payor. *See, e.g., Yardley* v. *Houghton Mifflin Co.*, 108 F. 2d 28 (2d Cir. 1930), *cert. denied*, 309 U. S. 686; *Lumiere* v. *Robertson-Cole Distributing Corp.*, 280 Fed. 550 (2d Cir. 1922), *cert. denied*, 259 U. S. 583; *Lumiere* v. *Pathe Exchange*, 275 Fed. 428 (2d Cir. 1921); *Grant* v. *Kellogg Co.*, 58 F. Supp. 48 (S. D. N. Y. 1944), *aff'd*, 154 F. 2d 59 (2d Cir. 1946). Donaldson never purported to reserve to himself and never throughout his life claimed any proprietary rights in the songs which he wrote for the Corporation.

We believe, in short, that the Court of Appeals, in reversing the District Court's holding on the "employer for hire" issue, erroneously interpreted, not only the evidence it claimed the right to review *de novo*, but the legal effect of that evidence under the Copyright Act, with consequent far-reaching effect on existing copyright and renewal rights.

POINT III

THE "CORPORATE BODY" PROVISION OF SECTION 24 OF THE COPYRIGHT ACT ENTITLES PETITIONER TO THE RENEWAL RIGHTS, AND THE COURT OF APPEAL'S CONTRARY HOLDING WAS ERROR.

If it be assumed, *arguendo*, that the Court of Appeals was empowered to disregard Rule 52(a) in this case and that it correctly held that Donaldson was not an "employee for hire," we believe that the "corporate body" pro-

vision of Section 24 of the Copyright Act, 17 U. S. C. § 24 entitles Petitioner to the renewal rights, and that the Court of Appeals should have so held.

The "corporate body" provision of Section 24 reads in relevant part:

> "* * * in the case of * * * any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) * * * the proprietor of such copyright shall be entitled to a renewal and extension * * *"

As stated earlier, the Court of Appeals proffered no explanation for its holding that the "corporate body" provision does not here apply. Its opinion merely asserts that the clause is "infrequently invoked" and "limited in scope" and "not entirely plain." These observations, whatever their validity, scarcely justify the Court of Appeals' refusal to construe the section or to state why it did not here apply. Especially is this so when the literal language of the statute seems to cover so clearly the uncontroverted facts of this case.

We have already set forth (pp. 28-29 *supra*) the reasons why Petitioner was not Donaldson's assignee or licensee, and the Court of Appeals did not hold that it stood in either capacity vis-a-vis Donaldson. Thus, the parenthetical exceptions in the "corporate body" provisions are here inapplicable.

Turning to the substance of the "corporate body" provision, Copyright Office Study No. 31 (1960)* cites several situations in which it should apply. As one example it cites:

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*Study No. 31, prepared for the Senate Judiciary Committee as part of the copyright law revision series, p. 137, fn. 215.

> "A work written by an official or a major stockholder of a corporation, where the work was written directly for the corporation but not as an employees [sic] for hire."

Again assuming, *arguendo,* that Donaldson was not an "employee for hire," the undisputed facts of this case fit precisely the example put by the Copyright Office: Donaldson (alone or in collaboration with various persons, including employees of the Corporation) wrote the songs. He was an "official" (the president and a director) and a "major stockholder" of the Corporation. He was contractually obligated to write songs "directly" for the Corporation, and he did so.

Likewise the Copyright Office Study refers to the dictum of Judge Learned Hand in *Shapiro* v. *Bryan, supra,* where he noted that the "corporate body" provision "may include 'works' which are composed by persons who may be related to a corporation neither as employees 'for hire,' nor as assignors or licensors." Plainly Donaldson was intimately "related" to the Corporation, and, as to many of the songs, they represented the composite work of Donaldson and other employees of the Corporation.

We submit that, in enacting the "corporate body" provision,* Congress intended to carry over the substance of the "employer for hire" doctrine to those instances where the doctrine would have been applicable but for the fact that an individual writer or composer, creating works at the instance and for the benefit of a corporation which paid him, may not technically have been an "employee for hire."

We think that the record here contains all evidence necessary to a determination of the "corporate body" issue.

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*It is of course axiomatic that Congress cannot be presumed to have used words without meaning, and that effect should thereafter be given, wherever possible, to the statutory provision. (*See, e.g., Ginsberg & Sons* v. *Popkin,* 285 U. S. 204, 208.)

However, if this Court believes that the record is in any respect deficient for this purpose, we think this Court should, at the very least, remand this case to the District Court for further determination with respect to the applicability of the statutory language. *See, e.g., Guzman* v. *Pichirilo, supra,* at p. 701; *Mallory* v. *Citizens Utility Company,* 342 F. 2d 796 (2d Cir. 1965); *Irish* v. *United States,* 225 F. 2d 3 (9th Cir. 1955).

CONCLUSION

We submit that, on the basis of the record and the authorities, the Court of Appeals' decision is not only erroneous, but represents an unjustified precedent of far-reaching significance. It should be reviewed by this Court, and to that end we respectfully urge this Court to grant this petition for a writ of certiorari.

Respectfully submitted,

FREDERICK W. R. PRIDE
LEO P. LARKIN, JR.
GUY C. QUINLAN
200 Park Avenue
New York, New York 10017

MAX CHOPNICK
9 East 46th Street
New York, New York 10017
Attorneys for Petitioner
Bregman, Vocco and Conn, Inc.

ROYALL, KOEGEL, ROGERS & WELLS
CONNER & CHOPNICK
JEROME E. MALINO
THEODORE R. JACKSON
Of Counsel

APPENDIX A

Opinion of the District Court

DONALDSON PUBLISHING CO.,

Plaintiff,

v.

BREGMAN, VOCCO AND CONN, INC.,

Defendant.

Civ. A. Nos. 140-216, 145-280.
United States District Court
S. D. New York.
Oct. 20, 1965.

Rosen, Seton & Sarbin, New York City, for plaintiff.

Conner & Chopnick, New York City, for defendant.

CANNELLA, District Judge.

Declaratory judgment granted in favor of the defendant.

It is agreed by the parties and the court finds, that the action herein for a declaratory judgment arises under 28 U. S. C. A. §§ 1338 and 1400, and is a controversy of a civil nature between citizens of different states, which involves an amount in excess of $10,000.00, exclusive of interest and costs.

The parties further agree that:

1) The plaintiff is a corporation organized under the laws of the State of California, with its principal place of business in Los Angeles and that the defendant is a corporation organized under the laws of the State of New York, with its principal place of business in New York City, in the Southern District of New York;

Appendix A

2) The declaratory judgment seeks to establish the ownership of the "renewal copyrights" of 87 songs written by Walter Donaldson;

3) Walter Donaldson and the defendant corporation, then known as Donaldson, Douglas & Gumble, Inc. entered into an agreement dated May 15, 1928, wherein all musical compositions written in whole or in part by Walter Donaldson during the term of the agreement, were to be delivered to Donaldson, Douglas & Gumble, Inc.;

4) Walter Donaldson did deliver all songs pursuant to the agreement and they are hereto incorporated by reference.[1]

5) All the songs were duly copyrighted and registered by defendant under its own name in the United States Copyright Office. In the registrations, Walter Donaldson was named as sole author or co-author;

6) The publication and mechanical reproduction rights of the defendant in said musical compositions were subject to the payment by defendant of the royalties as specified in the agreement;

7) During the five year life of the agreement, defendant rendered to Walter Donaldson, statements indicating thereon the royalty payments which Walter Donaldson was paid;

8) Walter Donaldson died on July 15, 1948 prior to the expiration of the original term of copyright of each of sa[illegible] 87 musical compositions. At the time he was survived

[1]Schedules A, B, C and D in complaint.

by Dorothy Donaldson, a divorced wife and therefore not a widow and two children, Ellen Bernice Donaldson Kerslake and Sheila Lynn Donaldson Shea. The children were infants at the time of Walter Donaldson's death;

9) The children have sold, transferred and assigned to plaintiff all their right, title and interest to the songs in question, including any interest in the renewal and foreign copyright protection of them and including all right, title and interest to all past, present and future claims, causes of action or suits.

Factual Background

In 1928, Walter Donaldson, Walter Douglas and Mose Gumble were individually engaged in the music publishing business; Walter Donaldson as a songwriter, Walter Douglas as a sales manager and Mose Gumble as a professional manager. They entered into negotiations to form a music publishing business in which they would be equal stockholders. They consulted Mr. Nathan Burkan, an attorney, who assigned Mr. Charles Schwartz to draw up the necessary documents. A preliminary pre-incorporation agreement dated April 23, 1928 was prepared by him. On May 4, 1928 the ultimate pre-incorporation agreement was signed by the parties. This agreement provided in substance for:

1) The formation of a music publishing corporation to be known as Walter Donaldson Music, Inc., the shares of which would be owned equally by the three incorporators;

2) An agreement by Donaldson "to write and compose musical works for the corporation exclusively, for a period of five years from the date of the incorporation of the com-

pany", with the right to have a drawing account against the royalties therein provided;

3) An agreement whereby Douglas would enter "into the employ of the corporation for a period of five years", * * * "as Business Manager", * * and "devote himself exclusively to the rendition of his services to the corporation". As compensation he was "to receive for his services $300 per week";

4) An agreement whereby Gumble would enter "into the employ of the corporation for a period of five years", * * * "as Professional Manager", * * * and "devote himself exclusively to the rendition of his services to the corporation". As compensation he was "to receive for his services $300 per week".

The corporate name adopted was Donaldson, Douglas & Gumble, Inc., since the name Walter Donaldson, Inc. was not available.

In the five year period embraced in the agreement, Walter Donaldson submitted 87 songs to the corporation for publication. Walter Donaldson actually received the weekly drawings of $300.00 for nearly three and one-half years and in addition, advances against expenses. Although the agreement contained a provision for the weekly drawings to increase to $500.00, the increased amount was never paid. As a matter of fact, after three and one-half years the drawings were entirely discontinued due to financial circumstances. At the time, the corporate records indicated Walter Donaldson was overdrawn. Walter Donaldson had other working arrangements besides the corporation work he performed, which conduct was countenanced by the corporation, e.g. 1) Ziegfield agreement; and 2)

agreement dated April 8, 1929, with Fox Film Corp., wherein Walter Donaldson and others performed some musical work for Fox Film Corp. In this agreement he was described as an employee of the defendant. This agreement however, was not signed by Walter Donaldson, but was signed by Walter Douglas as attorney in fact for Walter Donaldson; and 3) Z & G agreement. In 1933 Walter Donaldson assigned all his interest, stock or otherwise in Donaldson, Douglas & Gumble, Inc., to the defendant in exchange for a release from the defendant for the amount he was overdrawn on his royalty account. Within one year prior to the expiration of the original term of each of the copyrights in the songs herein involved, the defendant made due and timely application to the United States Copyright Office for a renewal and extension of them for a further term of 28 years, as the proprietor in works made for hire. Defendant claims that, having filed applications for the renewal of each such copyright in its own name, it became the owner of the renewal copyright in each such composition and of all rights in, under and with respect to each such renewal. The plaintiff's predecessors in interest have received and accepted from defendant $6,000.00 more or less, as royalty earned subsequent to the expiration of the original terms of copyright.

THE ISSUES

The within action is a consolidated one in which two actions were consolidated on June 30, 1961, pursuant to order of this court. The principal questions herein are twofold. They are set forth in the pre-trial order as follows:

(a) Whether or not Walter Donaldson with respect to the compositions written by him for the defendant

(known in 1928 as Donaldson, Douglas & Gumble, Inc.) was an employee for hire, as such term is used in the Copyright Act, Title 17 U. S. C. Sec. 24, whether under a contract dated May 15, 1928 between Walter Donaldson and the defendant, or otherwise [or whether Donaldson was an independent contractor].

(b) Whether or not the defendant is the proprietor of said 87 compositions written by Walter Donaldson as works copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) and belong to the defendant as such a corporate body.

The first inquiry therefore centers about the question of whether Walter Donaldson was an employee for hire or independent contractor. To determine this question it is necessary to 1) examine the formation of Donaldson, Douglas & Gumble, Inc.; 2) analyze the status of Donaldson as it appears in his agreement with the corporation and 3) examine the conduct of the parties during the life of the agreement.

Donaldson, Douglas and Gumble formed the corporation. Each had special qualities and contributed them to the corporation. There has never been any doubt that Douglas and Gumble were employees of the corporation. They had so stated. In addition their agreements with the corporation were couched in terms of employment and they received a salary. Walter Donaldson's status presents a clouded picture. He was undoubtedly the outstanding member of the company. He was well known in the industry and already had created a portfolio of songs. What was his intention when he joined together with Douglas and Gumble to form the corporation? The court finds that he deli-

berately chose to be an employee for hire. The songs herein were written by Donaldson either as sole or co-author for the defendant as employer, under the employment agreement and were works for hire as contemplated under the Copyright Act, 17 U. S. C. A. § 24. All of these 87 compositions were duly copyrighted by the defendant in its own name under its former corporate title, Donaldson Douglas & Gumble, Inc., between May 28, 1929 and April 12, 1933, inclusive, with Donaldson retaining certain royalty rights as specified in the agreement.

It might be argued that Donaldson's relationship with Ziegfield, Fox and Z & G, indicate that he was not an employee for hire, but the courts [*sic*] finds that the conduct of Douglas and Gumble in allowing Donaldson to in effect, breach his exclusive arrangement with the corporation, could be equally consistent with other considerations, e.g., their fondness for Donaldson; the increased prestige to the corporation because of the added prestige of Donaldson; or a so-called farm out. The court holds that the outside employment does not perforce create an independent contractual status on Donaldson.

The money arrangement was heavily weighted in Donaldson's favor but this does not compel the conclusion that he was an independent contractor. Under New York law, the arrangement Donaldson had and which he exploited to the extent that he was overdrawn, in effect amounted to a salary. See North Western Mutual Life Ins. Co. v. Mooney, 108 N. Y, 118, 15 N. E. 303 (1888); Kane v. Auto Laks Mfg. Co., Sup., 172 N. Y. S. 275 (1st Dept. 1918). See also Posner v. Precision Shapes, Inc., 271 App. Div. 435, 65 N. Y. S. 2d 733 (1st Dept. 1946) and cases cited therein.

Appendix A

The court although allowing the Prager report to be marked in evidence has not considered it in arriving at the determination of this case. The proper foundation for the admission of the report was not laid. 28 U. S. C. A. § 1732.

Without mentioning all the circumstances the court has considered, the court is satisfied from an examination of the total picture of Donaldson's relationship with the corporation that he was an employee for hire within the meaning of that term in the music publishing business. This being so, the defendant employer who had become proprietor of the original copyright of works made for hire, is entitled to the renewal rights. Shapiro, Bernstein & Co. v. Bryan, 123 F. 2d 697 (2d Cir. 1941); Fred Fisher Music Co. v. Leo Feist, Inc., 55 F. Supp. 359 (S. D. N. Y. 1944).

Having determined Donaldson to be an employee for hire and that the defendant is entitled to the renewal rights, the court does not deem it necessary to determine the second issue (issue (b) supra).

A declaratory judgment will therefore issue in favor of the defendant, to the 87 songs in question. The registration by the defendant is found to be the valid and effective registration and that of the plaintiff's predecessors is found to be null and void.

Submit order.

APPENDIX B

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 189—September Term, 1966.
(Argued January 3, 1967 Decided March 24, 1967.)
Docket No. 30367

DONALDSON PUBLISHING CO.,
Plaintiff-Appellant,

—v.—

BREGMAN, VOCCO & CONN, INC.,
Defendant-Appellee.

Before:

LUMBARD, *Chief Judge,*
FRIENDLY and HAYS, *Circuit Judges.*

Appeal from an order and judgment entered in the United States District Court for the Southern District of New York, John M. Cannella, *Judge,* sitting without a jury, dismissing plaintiff's complaint and declaring defendant to be the owner of certain renewal copyrights under the Copyright Act, 17 U. S. C. § 24.

Reversed and remanded.

LEWIS A. DREYER, New York, New York (Norma Hack and Rosen, Seton & Sarbin, on the brief), *for Appellant.*

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MAX CHOPNICK, New York, New York (Theodore R. Kupferman, S. Leonard Wall, John G. Proudfit and Connor & Chopnick, on the brief), *for Appellee.*

HAYS, *Circuit Judge:*

This is an action to determine the ownership under the Copyright Act, 17 U. S. C. § 24,[1] of the renewal copyright interest in eighty-seven songs written either alone or in collaboration with others by Walter Donaldson. Ownership is claimed by defendant under a contract, dated May 15,

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[1] § 24. *Duration; renewal and extension.*

The copyright secured by this title shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: *Provided,* That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further,* That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further,* That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication.

1928, between Donaldson and the defendant, known at that time as Donaldson, Douglas & Gumble, Inc. Donaldson died before the commencement of the renewal term. His two surviving children obtained renewal copyrights which they assigned to the plaintiff, Donaldson Publishing Company. This appeal is from an order and judgment entered in the United States District Court for the Southern District of New York, dismissing plaintiff's complaint and declaring defendant to be the owner of the renewal copyrights.[2] We hold that plaintiff is the rightful owner of the title to the renewal copyrights. The decision is therefore reversed and the case remanded to the district court.

In 1927, Donaldson, who was a prominent and successful songwriter, Walter Douglas, a sales manager for a music publishing firm, and Mose Gumble, a professional manager in the music publishing business, began negotiations for the formation of a music publishing company. After numerous conversations the parties reached substantial agreement in the spring of 1928 deciding to form a corporation. They then consulted a well known attorney in the music publishing field, Nathan Burkan, who assigned his associate, Charles Schwartz, to handle the matter.

After discussing with the parties the substance of their proposed transaction, Schwartz drew a draft of pre-incorporation agreement. This instrument provided for the formation of a corporation to be known as Walter Donaldson, Inc., Music Publishers, with Donaldson as its president.

The agreement also set forth the rights and obligations of the parties to the corporation. Donaldson was to write

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[2]The Court made an express determination under Rule 54(b) of the Federal Rules of Civil Procedure that there was no just reason for delay in entering judgment on defendant's counterclaim for declaratory relief but reserved defendant's other claims for future determination.

and compose musical works for the corporation and was to receive specified royalties. Douglas and Gumble were to be employed by the corporation, and each was to receive $300 a week for his services.

The parties discussed the draft and proposed changes were noted in the margin by Schwartz. These amendments, including a paragraph providing that Donaldson was to have "a drawing account against royalties of $300 per week during the first six months of [his] employment and of $500 per week during the balance of the term," were embodied in the final agreement which was signed by the parties on May 4, 1928. About two weeks later, following the incorporation of Donaldson, Douglas & Gumble, Inc.,[3] each of the parties executed separate contracts with the corporation which repeated almost verbatim the language of the pre-incorporation agreement.

During the ensuing five years Donaldson wrote 87 songs, either alone or in collaboration with others, which were published by defendant pursuant to the agreement. Among the songs were many written by Donaldson for use in musical stage plays and motion pictures, including for example the stage and screen versions of the well-known "Whoopee." Under the agreement the corporation obtained copyrights on all these songs, but the dramatic and synchronization rights were held by Donaldson and he, rather than the corporation, received substantial payments for such rights from the producers to whom they were negotiated. Defendant was given the right to license mechanical reproductions of the show songs and to publish them.

Donaldson earned approximately $164,000 in royalties during this period. Even so, by the end of the term of the

[3]This corporate name was chosen because the name "Walter Donaldson, Inc." was not available.

agreement in 1933 his drawing from the corporation exceeded by $12,000 the amount of royalties he had earned. The defendant treated this overdraft as a debt which was discharged when, at Douglas' request, Donaldson surrendered his stock in the corporation in exchange for a general release relieving him of all liability arising from the operation of the business.

The principal question before us is whether the defendant's relationship to Donaldson was that of an "employer for hire" within the meaning of section 24 of the Copyright Act, 17 U. S. C. § 24 (set out in full in footnote 1, *supra*), which permits an "employer for whom [a copyrighted] work is made for hire" to renew and extend the copyright in such work for a further term of twenty-eight years. If Donaldson was not an employee for hire of the defendant corporation, then, under Section 24, Donaldson having died, his surviving children had the right to renew the copyrights.

We may say by way of preface to our opinion on the merits that we do not consider ourselves bound in this case by the "unless clearly erroneous" test of Federal Rule 52(a) with respect to the trial court's determination that Donaldson was an employee for hire. See *Mamiye Bros.* v. *Barber SS. Lines, Inc.*, 360 F. 2d 774, 776-78 (2d Cir.), cert. denied, 385 U. S. 835 (1966).

To support its contention that Donaldson was an employee for hire, defendant relies principally on the use of the term "employment" in the clause providing Donaldson with a drawing account,[4] and on the drawing account itself, which defendant contends was the equivalent of a salary. These contentions lack substantial merit.

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[4]The clause provides:

> "You shall have a drawing account against your royalties of $300. per week during the first six months of your employment, and of $500. per week during the balance of the term. The corporation shall have the right to deduct such drawings from any royalties that may have theretofore or that may thereafter accrue to you."

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It is true that during the first three and one-half years of the agreement, Donaldson was paid weekly checks of $300, aggregating approximately $78,000, each specifically designated "weekly drawing account." However, these payments represent less than one-half of the sum paid or credited to Donaldson in irregular amounts during the same period (approximately $167,000). No weekly drawing account was paid Donaldson during the final 18 months of the contract. Donaldson's request in August, 1932 that the weekly draw be restored was denied. At no time was he paid $500 per week as provided by the contract. At the end of the five year term of the agreement the $12,000 by which Donaldson's drawings exceeded his royalties was treated as a debt owned to the corporation. It thus seems clear that Donaldson's drawings from the corporation were not the wages of an employee for hire but rather constituted a loan which, to the extent drawings exceeded actual royalty earnings, had to be repaid.

The provision referring to Donaldson's period of "employment" was not contained in the draft pre-incorporation agreement and the parties have argued, with equal persuasiveness, that its subsequent inclusion was or was not intended to effect a change. However, we find a more compelling indication of their intention in the fact that the unequivocal language of the agreement, making it clear that Douglas and Gumble were to be employees,[5] is not re-

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[5]The agreement provides:

> "Douglas agrees to enter into the employ of the corporation for a period of five years from the date of its incorporation, as Business Manager. . . .
>
> Gumble agrees to enter into the employ of the corporaton for a period of five years from the date of its incorporation, as Professional Manager. . . ."

Both Douglas and Gumble entered contracts with the corporation in which it is stated:

> "We hereby employ you, and you hereby enter into our employ. . . ."

peated in the paragraphs concerning Donaldson. The word "employment" as applied to Donaldson appears to be a short-hand way of saying "during the period during which you will be writing songs to which the corporation has certain rights and will have certain royalties coming to you from such songs."

The actions of the parties and their construction of the agreement corroborate the conclusion that Donaldson was not an employee for hire. The money arrangement was heavily weighted in his favor. For example, with three months of the execution of the agreement Donaldson agreed to write the score for "Whoopee." He executed the contract in his own name and received the entire advance payment and a percentage of the box office receipts from this very successful show. Defendant received only the right, reserved to it in its contract with Donaldson, to publish the music; it never claimed any right to the consideration Donaldson received for writing the score and, in fact, subsequently made its own agreement with the producer, Florenz Ziegfeld, acquiring all the publishing rights which Ziegfeld could convey.

In December, 1929, Donaldson conveyed to Samuel Goldwyn the exclusive motion picture synchronization rights to the "Whoopee" score, receiving with his co-authors, a proportionate share of the $50,000 fee. Defendant did not receive any part of this fee or of the extra $5,000 paid Donaldson for creating additional music for the motion picture version of "Whoopee."

Donaldson also wrote for Fox Film Corporation and Paramount Publix Corporation, and he, rather than defendant, received the entire consideration under these contracts. While there was an agreement with Fox including a provision by which defendant consented to let its "employee" Donaldson work for Fox for a specified twelve week

period, Donaldson did not sign this agreement; it was instead executed for him by Douglas, his attorney in fact.[6] The characterization of Donaldson in the Fox agreement is, therefore, far less significant than is the fact that Donaldson's relationship with defendant left him free to engage in these various outside writing activities from which he derived substantial independent income.

Moreover, an essential element of the employer-employee relationship, the right of the employer "to direct and supervise the manner in which the writer performs his work" (see Nimmer, Copyright, § 62.31 (1964)), is lacking here. No power to control or supervise Donaldson's performance was reserved to the corporation or exercised by it. Cf. *Tobani* v. *Carl Fisher, Inc.*, 98 F. 2d 57, 59 (2d Cir.), cert. denied, 305 U. S. 650 (1938).

This lack of control over Donaldson's performance, Donaldson's dominant role in the corporation, his freedom to engage in profitable outside activities without sharing the proceeds with defendant, the absence of any fixed salary and the language of the agreement itself indicate that Donaldson was not an "employee" in the substantial sense required by the Copyright Act.

Defendant contends that regardless of whether Donaldson was an employee for hire, it is entitled to the renewal copyrights under the infrequently invoked provision of section 24 of the Copyright Act, 17 U. S. C. § 24, vesting the renewal copyright "of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author)" in the corporation. While the meaning of this clause is not entirely plain (see *Shapiro Bernstein & Co.* v. *Bryan*, 123 F. 2d 697, 699 (2d Cir. 1941)), its scope

[6] No agreement involving the defendants were executed with Ziegfeld and Goldwyn in respect to the "Whoopee" music.

is quite limited. See Nimmer, Copyright § 114.3 (1964). We hold that this provision does not apply to the facts of this case.

Donaldson's surviving children, as "children of the author" (17 U. S. C. § 24) properly obtained the renewal copyrights which have been assigned to plaintiff.

The decision is reversed and the case remanded.

APPENDIX C

Orders Denying Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DONALDSON PUBLISHING CO.,
Plaintiff-Appellant,

v.

BREGMAN, VOCCO and CONN, INC.,
Defendant-Appellee.

PETITION FOR REHEARING

Royall, Koegel, Rogers & Wells, New York, N. Y., for defendant-appellee.

Petition denied.

J. E. L.
H. J. F.
P. R. H.
U. S. C. JJ.

Jul 5 - 1967

Appendix C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DONALDSON PUBLISHING CO.,
Plaintiff-Appellant,

v.

BREGMAN, VOCCO and CONN, INC.,
Defendant-Appellee.

PETITION FOR REHEARING IN BANC

Royall, Koegel, Rogers & Wells, New York, N. Y., for defendant-appellee.

No active circuit judge having requested that a vote be taken on the suggestion that the case be reheard in banc, the same stands denied.

J. Edward Lumbard
Chief Judge

5 July 1967

APPENDIX D

Text of Preincorporation Agreement

May 4th, 1928.

Mr. Walter Donaldson.

Dear Mr. Donaldson,

The following is our agreement:

1. You and we agree to promptly cause to be organized under the laws of New York a corporation under the name of Walter Donaldson, Inc. Music Publishers, or if that name is not available, such other name as we mutually agree upon, such corporation to have a capitalization of 100 shares of no par value, to conduct the business of music publishers, the provisions of the Certificate of Incorporation to give such corporation the broadest powers incidental to the conduct of operation of a music publishing business.

2. The corporation is to have three directors consisting of you and ourselves.

As soon as the Board of Directors is elected, we agree to appoint as officers the following:

You to be the President,

Douglas to be the Vice-President and Treasurer,

Gumble to be the Secretary.

3. You agree, promptly upon the formation of the corporation, to enter into a contract with the corporation upon the following terms:

You agree to write and compose musical works for the corporation exclusively, for a period of five years from the date of the incorporation of the company,

Appendix D

In consideration of your making such contract, the corporation will agree to deliver to you one-third of its entire capital stock, and to pay you the following royalties:

A sum equal to 10% of the retail price of all music written or composed by you which is sold by the company, subject to the proviso that your royalty shall in no event be less than 3¢ for and upon each and every copy of sheet music of such musical works sold in the United States and Canada, subject to the further proviso that with respect to production numbers your royalties shall in no event be less than 8¢ for and upon each and every copy of sheet music thereof sold in the United States and Canada. You are also to receive 50% of all moneys collected by us from the mechanical reproduction of any such works in the United States and Canada.

You are also to receive one-half of all moneys collected by us as foreign royalties whether because of the publication of such works in foreign countries or because of their mechanical reproduction.

If you have any collaborators in any such works, the corporation shall arrange for and pay to such collaborators their compensation or royalty, such compensation or royalty to be paid out of the sums payable to you hereunder, but the amount of such compensation or royalties payable to such collaborators shall be subject to your approval. Furthermore, in the case of production numbers, the corporation shall arrange for and pay to the producer of the musical plays containing such production numbers the compensation or royalty, if any, which may be payable to him on account of the publication or mechanical reproduction of any such

production numbers, such compensation or royalty to be paid out of the sums payable to you hereunder, but the amount of such compensation or royalty shall be subject to your approval.

The corporation shall monthly during the term of your contract deposit in a special account to be known as the "Royalty Account" all royalties which have become payable to you during each such current month, and you shall have the right to withdraw such royalties deposited in such account as and when you may desire so to do.

You shall have a drawing account against your royalties of $300. per week during the first six months of your employment, and of $500. per week during the balance of the term. The corporation shall have the right to deduct such drawings from any royalties that may have theretofore or that may thereafter accrue to you.

All publication and mechanical reproduction rights in your musical works written and composed during the term of your contract with the corporation, shall be and vest in the corporation immediately upon the creation of such musical works by you, subject, of course, to the payment to you of the royalties above specified, and the corporation shall have the right to secure copyright in its name in all such works.

The corporation will obligate itself to print and publish in first class style such of your musical works as they may deem suitable for publication and for which they believe there will be a public demand, and the corporation will agree to use its best efforts to introduce such musical works into the general market and to popularize and create a demand for the same.

Appendix D

4. Douglas agrees to enter into the employ of the corporation for a period of five years from the date of its incorporation, as Business Manager, and he is to agree to devote himself exclusively to the rendition of his services to the corporation. He is to receive for his services $300. per week. He is also to subscribe and pay for one-third of the capital stock of the corporation, the price to be fixed by the Board of Directors at a nominal amount.

5. Gumble agrees to enter into the employ of the corporation for a period of five years from the date of its incorporation, as Professional Manager, and he is to agree to devote himself exclusively to the rendition of his services to the corporation. He is to receive for his services $300. per week. He is also to subscribe and pay for one-third of the capital stock of the corporation, the price to be fixed by the Board of Directors at a nominal amount.

* * *

Your signature at the foot hereof underneath the word "Accepted" will make this a binding agreement between us.

Very truly yours,

(Signed) Walter G. Douglas
WALTER G. DOUGLAS
(Signed) Mose Gumble
MOSE GUMBLE

Accepted:

(Signed) Walter Donaldson
WALTER DONALDSON

APPENDIX E

MG
WGD
WD

Corporate Minutes

MINUTES of a meeting of the Board of Directors of DONALDSON, DOUGLAS & GUMBLE, INC., held at No. 1451 Broadway, Borough of Manhattan, City of New York, on the 15th day of May, 1928, at 5 o'clock in the afternoon.

PRESENT:

WALTER DONALDSON
WALTER G. DOUGLAS
MOSE GUMBLE

being all the directors of the company.

Mr. Donaldson acted as Chairman of the meeting and Mr. Gumble as Secretary thereof.

The following were duly elected officers of the company:

Walter Donaldson —President
Walter G. Douglas—Vice-President and Treasurer
Mose Gumble —Secretary

Upon motion duly made and seconded, it was

RESOLVED, (Mr. Walter Donaldson not voting or participating in the discussion on this resolution) that this company enter into a contract with Mr. Walter Donaldson, as follows:

That Mr. Donaldson shall write and compose musical works for the company exclusively for the period of five (5) years from the date hereof, to wit, May 15, 1928; that in consideration of the making of such contract this company shall deliver to Mr. Donaldson one-third of its entire capital stock, to wit, 33⅓ shares fully paid and non-assessable, and shall pay to him the following royalties:

a sum equal to 10% of the retail price of all music written or composed by him which is sold by the company, subject to the proviso that his royalty shall in no event be less than 3¢ for and upon each and every copy of sheet music of such musical works sold in the United States and Canada, and subject to the further proviso that with respect to production numbers his royalties shall in no event be less than 8¢ for and upon each and every copy of sheet music thereof sold in the United States and Canada; that he shall receive 50% of all moneys collected by the company from the mechanical reproduction of any such works in the United States and Canada; that he shall receive one-half of all moneys collected by the company as foreign royalties whether because of the publication of such works in foreign countries or because of their mechanical reproduction; that if he shall have any collaborators in any such works, the company shall arrange for and pay to such collaborators their compensation or royalty, such compensation or royalty to be paid out of the sums payable to Mr. Donaldson thereunder, but the amount of such compensation or royalties payable to such collaborators shall be subject to his approval; that in the case of production numbers, the company shall arrange for and pay to the producer of the musical plays containing such production number the compensation or royalty, if any, which may be payable to such producer on account of the publication or mechanical reproduction of any such production numbers, such compensation or royalty to be paid out of the sums payable to Mr. Donaldson, but the amount of such compensation or royalty shall be subject to his approval; that the company shall, monthly during the term of Mr. Donaldson's contract, deposit in a special account to be known as "the Royalty Account" all royalties which have become payable to him

MG
WGD
WD

during each such current month, and he shall have the right to withdrew such royalties deposited in such account as and when he may desire to do; that he shall have a drawing account against his royalties of $300. per week during the first six months of his employment, and of $500. per week during the balance of the term. The company shall have the right to deduct such drawings from any royalties that may have theretofore or that may thereafter accrue to him.

All publication and mechanical reproduction rights in his musical works written and composed during the term of his contract with the company, shall be and vest in the company immediately upon the creation of such musical works by him, subject, of course, to the payment to him of the royalties above specified, and the company shall have the right to secure copyright in its name in all such works; that this company shall obligate itself to print and publish in first class style such of his musical works as it may deem suitable for publication and for which it believes there will be a public demand, and the company will agree to use its best efforts to introduce such musical works into the general market and to popularize and create a demand for the same; and it was further

RESOLVED, that the company enter into the agreement with Mr. Donaldson in the form herewith submitted to and approved of by this Board of Directors.

Upon motion duly made and seconded, it was

RESOLVED, (Mr. Walter G. Douglas not voting or participating in the discussion on this resolution), that this company enter into a contract of employment with Mr. Walter G. Douglas, for a period of five (5) years from the date hereof, to wit, May 15, 1928, and that Mr. Douglas shall render his services to the company as business man-

ager and shall agree therein to devote himself exclusively to the rendition of his services to the company, and that he is to receive for his services the sum of $300. per week; and it was further

RESOLVED, that the company enter into the agreement with Mr. Douglas in the form herewith submitted to and approved of by this Board of Directors. MG WGD WD

Upon motion duly made and seconded, it was

RESOLVED, (Mr. Mose Gumble not voting or participating in the discussion on this resolution), that this company enter into a contract of employment with Mr. Mose Gumble for a period of five (5) years from the date hereof, to wit, May 15, 1928, and that Mr. Gumble shall render his services to the company as professional manager and shall agree therein to devote himself exclusively to the rendition of his services to the company, and that he is to receive for his services the sum of $300. per week; and it was further

RESOLVED, that the company enter into the agreement with Mr. Gumble in the form herewith submitted to and approved of by this Board of Directors.

Upon motion duly made and seconded it was

RESOLVED, that the capital of the company be fixed at $1,000., and that 66⅔ shares of the capital stock of the company remaining after the issuance to Mr. Walter Donaldson of 33⅓ shares of the capital stock, as hereinabove provided, shall be offered for subscription at $10. per share.

Mr. Douglas thereupon offered to subscribe to and pay for 33⅓ shares of the capital stock of the company at $10. per share, which offer was accepted.

Appendix E

Mr. Mose Gumble thereupon offered to subscribe to and pay for 33⅓ shares of the capital stock of the company at $10. per share, which offer was accepted.

Upon motion duly made and seconded, it was

RESOLVED, that this company have as its banking depositary the Bowery and East River National Bank of New York, 41st Street Branch, now known under the name of Bank of America National Association.

Upon motion duly made and seconded, it was

RESOLVED, that all checks of the company shall be valid when issued signed by the Treasurer and countersigned by the Secretary.

There being no further business the meeting adjourned.

WALTER DONALDSON
Chairman

MOSE GUMBLE
Secretary

The undersigned, being all the Directors of DONALDSON, DOUGLAS & GUMBLE, INC., have read the foregoing minutes and hereby ratify, confirm and approve the same.

WALTER DONALDSON

WALTER G. DOUGLAS

MOSE GUMBLE

APPENDIX F

Letter Agreement between Walter Donaldson and Donaldson, Douglas & Gumble, Inc.

New York, May 15, 1928.

Mr. Walter Donaldson
1595 Broadway
New York City.

Dear Mr. Donaldson:

The following is our agreement:

1. You hereby agree to write and compose musical works for us exclusively, for the period of five (5) years commencing with the date hereof.

2. In consideration of the execution and delivery of this agreement by you, we agree to issue and deliver to you one-third (⅓) of our entire capital stock, to wit, 33⅓ shares fully paid and non-assessable.

We also agree to pay you the following royalties:

A sum equal to ten percent (10%) of the retail price of all music written or composed by you, sold by us, subject to the proviso that your royalties shall in no event be less than three cents (3¢) for and upon each and every copy of sheet music of such musical works sold in the United States and Canada, and subject to the further proviso that with respect to production numbers your royalties shall in no event be less than eight cents (8¢) for and upon each and every copy of sheet music thereof sold in the United States and Canada.

You shall also receive fifty percent (50%) of all moneys collected by us from the mechanical reproduction of any such works in the United States and Canada.

Appendix F

You shall also receive one-half (½) of all moneys collected by us as foreign royalties whether because of the publication of such works in foreign countries or because of their mechanical reproduction.

If you shall have any collaborators in any such works, we will arrange for and pay to such collaborators their compensation or royalty, such compensation or royalty to be paid out of the sums payable to you hereunder, but the amount of such compensation or royalty payable to such collaborators shall be subject to your approval.

In the case of production numbers, we shall arrange for and pay to the producer of the musical plays containing such production numbers, the compensation or royalty, if any, which may be payable to such producer on account of the publication or mechanical reproduction of such production numbers, such compensation or royalty to be paid out of the sums payable to you, but the amount of such compensation or royalty shall be subject to your approval.

3. We agree, during the term of this contract, to deposit in a special account to be known as the "Royalty Account", all royalties which have become payable to you during each calendar month, and you shall have the right to withdraw such royalties deposited in such account as and when you may desire so to do.

4. You shall have a drawing account against your royalties of Three Hundred ($300.) Dollars per week during the first six months of your employment, and of Five Hundred ($500.) Dollars per week during the balance of the five-year term hereof.

We shall have the right to deduct such drawings from any royalties that may have theretofore or that may thereafter accrue to you.

Appendix F

5. All publication and mechanical reproduction rights in your musical works written and composed during the five-year term hereof, shall be and vest in us immediately upon the creation of such musical works by you, subject to the payment to you of the royalties above specified, and we shall have the right to secure copyright in our name in all such works.

6. We agree to print and publish in first-class style such of your musical works as we may deem suitable for publication and for which we believe there will be a public demand, and we agree to use our best efforts to introduce such musical works into the general market and to popularize and create a demand for the same.

Your signature at the foot hereof underneath the word "Accepted", will make this a binding agreement between us.

Yours very truly,

DONALDSON, DOUGLAS & GUMBLE, INC.

By WALTER G. DOUGLAS,
Treasurer

ACCEPTED:

I hereby accept the above and agree to become bound thereby and to carry out and perform all the terms and conditions thereof on my part to be kept and performed.

WALTER DONALDSON L.S.

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JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term 1967

No. 680

BREGMAN, VOCCO AND CONN, INC.,
Petitioner,

— against —

DONALDSON PUBLISHING CO.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LEWIS A. DREYER
Attorney for Respondent
Donaldson Publishing Co.
1619 Broadway
New York, New York 10019

NORMA HACK
ROSEN, SETON & SARBIN
Of Counsel

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Supreme Court of the United States

October Term 1967

No. 680

BREGMAN, VOCCO AND CONN, INC.,

Petitioner,

against

DONALDSON PUBLISHING CO.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below and Jurisdiction

The citations to the opinions below (P.A.* 1a, 9a, 18a, 19a) and the jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

1. Under the agreement dated May 15, 1928 ["the Agreement"] (R.A.* 13b, Pl. Ex. 4, R.** 101), was Walter Donaldson's relationship to the Petitioner ["the Corporation"] that of an independent contractor or an employee for hire?

2. Was the Court of Appeals precluded by Rule 52(a) Federal Rules of Civil Procedure ["the Rule"] from

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* Citations to "(P.A. a)" and "(R.A. b)" are to pages of Petitioner's and Respondent's respective appendices.

** Citations to "(R.)" are to pages of the certified record.

making a determination as to the minimum legal standard of conduct requisite to the existence of employment for hire within the meaning of Section 24 of the Copyright Act?

3. Did the Court of Appeals correctly hold that the "corporate body" provision of Section 24 of the Copyright Act is inapplicable here, where the author is specifically identified and the rights of the parties are controlled by an express written songwriter's agreement?

Statute and Rule Involved

The pertinent provisions of the Copyright Act (17 U.S.C. § 24) and the Rule are set forth in the Petition at Pages 3-4.

Statement of the Case

This is an action, originally brought in the Federal Court on the basis of diversity of citizenship, for the determination of title to the renewal copyright interest in eighty-seven (87) songs ["the Songs"] deriving from the authorship or co-authorship of Walter Donaldson ["Donaldson"], pursuant to the Agreement between Donaldson and the Corporation (the former name of which was Donaldson, Douglas and Gumble, Inc.).

The principal question of law and fact in the determination of such title is whether, under the Agreement, Donaldson's status was that of an independent contractor or that of an employee for hire. The District Court held "from an examination of the total picture of Donaldson's relationship with the corporation that he was an employee for hire within the meaning of that term in the music publishing business" (P.A. 8a).

The Court of Appeals reversed the determination as to the character of Donaldson's legal status, holding that he was "not an 'employee' in the substantial sense required by the Copyright Act" (P.A. 16a).

Background Facts

Prior to 1927, Donaldson was a very prominent and successful songwriter (R. 123-125). Walter Douglas ["Douglas"] was a sales manager (R. 196) and Mose Gumble ["Gumble"] was a professional manager in the music publishing business (R. 199). In the latter part of 1927, the three entered into negotiations for the formation of a music publishing company of which they would be equal stockholders (R. 198-200).

After numerous discussions and after having worked out their agreement among themselves, the parties consulted a prominent lawyer in the music publishing field, Nathan Burkan, Esq. (R. 198-200), whose partner, Charles Schwartz, handled the matter (R.A. 4b, R. 50-54).

The instructions to Mr. Schwartz resulted in a draft of a pre-incorporation agreement dated April 23, 1928 ["the first draft"] (R.A. 6-7b, Pl. Ex. 2, R. 100, 201). The instrument provided for the formalities of incorporation of a corporation to be known as Walter Donaldson, Inc. Music Publishers, its capitalization, the designation of corporate officers and directors, and limitations on the disposition of stock. The major portion of the agreement was, however, devoted to a statement of the rights and obligations of the three individuals in relation to the corporation to be formed.

The language of the first draft with respect to the commitments made by each of the three parties, respectively, is as follows:

> (a) "Douglas agrees to enter into the employ of the corporation . . . and he is to agree to devote himself exclusively to the rendition of his services to the corporation. He is to receive for his services $300. per week . . ." (R.A. 7b(2), ¶ 4).
>
> (b) "Gumble agrees to enter into the employ of the corporation . . . and he is to agree to devote

himself exclusively to the rendition of his services to the corporation. He is to receive for his services $300. per week . . . (R.A. 7b(2), ¶ 5).

(c) Donaldson agrees (R.A. 7b(1), ¶ 3) ". . . to enter into a contract with the corporation upon the following terms:

You [Donaldson] agree to write and compose musical works for the corporation exclusively, for a period of ten years from the date of the incorporation of the company."

The first draft also provided that ". . . in consideration of . . . making such contract," the Corporation would issue one-third of its stock to Donaldson and pay him certain royalties with respect to printed editions and mechanical reproductions of the Songs written under the contract (R.A. 7b(1), ¶ 3). No provision was made for the payment of royalties with respect to any other rights.

The rights to which the Corporation would become entitled were as follows (R.A. 7b(2)):

"All publication and mechanical reproduction rights in your musical works written and composed during the term of your contract with the corporation, shall be and vest in the corporation immediately upon the creation of such musical works by you, subject, of course, to the payment to you of the royalties above specified, and the corporation shall have the right to secure copyright in its name in all such works."

A meeting was held at which the terms of the first draft were discussed. Some five proposed changes were noted in the handwriting of Mr. Schwartz on the margin of his copy of the first draft (R.A. 4b, 6b-7b). Except as to the substance of the five marginal notes, all of which were incorporated in the pre-corporation agreement ultimately executed on May 4, 1928 (R.A. 8b-12b, Pl. Ex. 3, R. 101), no changes from the first draft were made.

The marginal note with which this litigation is most materially concerned was, in *haec verba*:

> "Drawing a/c 300. a week for 1st six months 500. a week for balance of term"

The substance of this note, which itself contained not a word referring to "employment," was embodied in the paragraph "3" of the pre-incorporation agreement in this form (R.A. 10b):

> "You shall have a drawing account against your royalties of $300. per week during the first six months of your employment, and of $500. per week during the balance of the term. The corporation shall have the right to deduct such drawings from any royalties that may have theretofore or that may thereafter accrue to you."

The language of the pre-incorporation agreement, as to each party, was incorporated virtually verbatim, in the three separate contracts subsequently executed by each of Donaldson, Douglas and Gumble, on May 15, 1928 (R.A. 13b-17b), Pl. Ex. 4, 5, 6, R. 101, 102, 103), after the incorporation of Donaldson, Douglas and Gumble, Inc. [the name Walter Donaldson not having been available (R. 203)].

The Minutes of the first meeting of the Board of Directors of the Corporation included resolutions authorizing the execution of the individual contracts by incorporating the exact terms of the pre-incorporation agreement. To the extent that the single word "employment" appeared in the pre-incorporation agreement in the context shown above, it similarly, but not otherwise, appeared in the Minutes (P.A. 24a-28a).

During the ensuing five years, Donaldson wrote, alone or with other songwriters of his choice, 87 songs, all of which were published by the Corporation pursuant to the Agreement (R.A. 2b, Pre-Trial Order, R. 50-54 and R.A. 5b, Court Ex. 1, R. 99). In each instance in which Don-

aldson composed a song without the collaboration of another songwriter, he was named in the copyright registration as the sole author. When he collaborated with another songwriter, Donaldson and the other songwriter were designated in the copyright registration as co-authors. No registration of copyright for any song composed in whole or in part by Donaldson ever gave credit to the Corporation or any arranger-employee of the Corporation as author or co-author (R.A. 5b, ¶ 1). All registrations of copyright of Donaldson's works were made by the Corporation.

Among the Songs were many written by Donaldson for use in musical stage plays and in motion pictures. Thus, within three months after the execution of the Agreement, Donaldson agreed to write the score of "Whoopee", a dramatico-musical play for the legitimate stage. He and his co-author, Gus Kahn, executed the contract in their own names, warranting the right to enter into the contract and granting exclusive rights for dramatic uses. Donaldson did provide, as required by his exclusive publishing agreement, that the Corporation would publish the music. The entire advance payment and a percentage of box office receipts of this highly successful show were paid directly to Donaldson alone (R.A. 18b-19b, Pl. Ex. 7, R. 103).

The Corporation was not a party to that agreement and it never claimed any right to the consideration for Donaldson's writing of the score. In fact, it subsequently made its own agreement with Ziegfeld under which it acquired all of the publishing rights which Ziegfeld could convey. For these rights, the Corporation paid Ziegfeld the sum of $1,000 (Pl. Ex. 8, R. 104).

In December, 1929, some 18 months after the execution of the Agreement, the same draftsman, Mr. Schwartz, as attorney for Samuel Goldwyn, prepared the agreement for Goldwyn's acquisition of the exclusive motion picture rights to "Whoopee" (R.A. 19b-22b, Pl. Ex. 9, R. 106).

By this agreement, Donaldson and his co-authors granted to Goldwyn the exclusive motion picture synchronization rights to the "Whoopee" score for both the original and renewal terms of copyright. As a co-owner, with his co-authors, of the synchronization rights, Donaldson personally was paid a proportionate share of the $50,000 fee. The Corporation was not a party to this agreement and received no part of the fee. Similarly, Donaldson and his co-writer, Gus Kahn, agreed to create additional music for the motion picture version of "Whoopee" for which each was paid, directly, the sum of $5,000, no part of which was paid to or claimed by the Corporation (Pl. Ex. 10, R. 106).

With the knowledge which Mr. Schwartz had of the relationship between Donaldson and the Corporation, and, necessarily, of the fact that the Corporation was the owner of record of the copyrights of the music of the "Whoopee" stage production, Mr. Schwartz, as attorney for Samuel Goldwyn, obtained the synchronization rights from Donaldson only and obtained neither a grant nor a waiver of any rigths from the Corporation. This agreement, containing Donaldson's grant of renewal rights and his warranty of ownership of the synchronization rights, was signed in the first instance by Walter Douglas as Donaldson's attorney-in-fact (R.A. 21b, 22b).

Donaldson also wrote for Fox Film Corporation and Paramount Publix Corporation (R.A. 23b-25b, Deft. Ex. EE, R. 228, 294; Deft. Ex. GG, R. 119). The entire consideration under these contracts was paid to Donaldson and his co-author, and either Donaldson or the motion picture producer paid all his transportation and other expenses connected with the performance of those contracts (R. 190).

Mr. Douglas and Mr. Schwartz were unanimous in the understanding that Donaldson owned the dramatic and synchronization rights in the songs written by him (R.

157-158; R. 233-235). Douglas also conceded that the corporation had not the right to commit Donaldson to write anything without Donaldson's express permission (R. 259).

Donaldson's outside activities, in 1932, also included personal stage performances on the vaudeville circuit in Chicago (Deft. Ex. LL, R. 120).

The Agreement provided for the payment of royalties to Donaldson, at specified rates, only on income derived from the sale of printed copies and from the mechanical reproduction of the songs. These royalties were to be shared with his collaborators and producers and the amount to be paid out was subject to Donaldson's express approval. The Corporation was required "during the term of this contract" to deposit, in a special "Royalty Account", all royalties which became payable during each calendar month and Donaldson had "the right to withdraw such royalties deposited in such account as and when [he] may desire so to do" (R.A. 14b, Pl. Ex. 4, ¶3). The arrangement whereby Donaldson could draw on his earnings immediately and at will was, in itself, most unusual in that writers customarily received their accountings and were paid only at six month intervals (R. 271).

Paragraph "4" of the Agreement provided, separately, for a drawing account of $300 a week during the first six months and $500 a week during the balance of the five year term, such drawings to be deductible from any royalties theretofore or thereafter earned.

From the inception of the Agreement, May 15, 1928, to December 31, 1931, roughly three and one-half years, Donaldson actually earned royalties aggregating some $145,000. The payments made to him or for his account in that period amounted to approximately $168,000. Of the amount so paid, $78,000 was represented by weekly checks, the first of which was dated June 8, 1928 and

the last November 30, 1931, each in the sum of $300, specifically designated "weekly drawing account". Never at any time was he paid a "weekly drawing account" in the sum of $500. At no time after November 30, 1931, although the Agreement had still one and one-half years to run, was any further payment in any amount, made, charged or credited as "weekly drawing account" (Pl. Ex. 11, R. 110).

In response to Donaldson's request for the restoration of the weekly draw, in August, 1932 (R. 269), Douglas wrote on August 4, 1932 (Pl. Ex. 14, R. 269):

> "It would certainly be a pleasure to give it to you, Walter, it it were possible but you know how conditions are at the moment and that you might just as well ask for the Moon."

As of December 31, 1931, Donaldson had drawn some $23,000 more than his actual earned royalties. From January 1, 1932 to May 15, 1933, the end of the term, he earned royalties of $19,394.46. During that same period, he drew only $7,859.76 (no part of which was designated as weekly drawing account). The actual earned royalties were applied in reduction of the pre-existing debit balance. At the end of the term of the Agreement, there still remained a debit balance of $12,139.27 (Pl. Ex. 11-7, 8, 9, R. 110).

On May 15, 1933, Douglas wrote to Donaldson (Pl. Ex. 15, R. 278, 279-280):

> "I am sorry that you were unable to find your stock certificate. You see, Walter, I want to handle the proposition in such a way that in exchange for your turning in your stock certificate to the firm, the firm will give you a general release for the amount of your overdraft. There is no sense in your turning in your stock certificate for nothing and then, in case some stranger came in here, have him sue you for the overdraft and get a judgment against you and an attachment against your royalties from

> some other company for the amount of the judgment. In other words if you are going to turn in your certificate I want the consideration to be that you get a complete release in return. I guess we will have to let the matter rest until I get to California where we can have it done legally."

On June 8, 1933, at Douglas' request (R. 201-205), Donaldson surrendered his stock in the Corporation and received in return a general release of all liability for the amount of the overdraft (letter dated June 8, 1933 from Walter Donaldson to the Corporation, part of Deft. Ex. A, R. 110-111).

Summary of Argument

This Court has frequently held that the Rule is not applicable to, nor does it preclude on appeal, review of the correctness of a lower court's application of the facts to a required legal standard. Reversal is similarly permitted where there exists a firm conviction that a mistake was committed because the decision does not jibe with applicable law.

Here, the ultimate issue was the legal character of Donaldson's relationship to the Corporation. Was he an independent contractor or was he, as Petitioner contends, a "hired" employee within the meaning of the Copyright Act?

For the answer to that question, the Court of Appeals, as it had done many times before, properly invoked, and reaffirmed as controlling under the Copyright Act, the long, well-established legal standards traditionally determinative of the master-servant relationship. Applying those standards to the specific contractual relation evidenced by the Agreement and the fully documented acts of the parties in the performance thereof, the Court found that Donaldson's relationship was not one of service.

To the extent that uniformity of decision has been promoted by the restatement and definitive formulation of the requisite standard of conduct which shall constitute employment for hire within the meaning of the Copyright Act, the decision here is of compelling importance to the music industry. But since it is the particular contractual arrangement in each case which must be measured against the yardstick of those standards, the decision reached by the application of the facts here is narrowly limited, in its ramifications, to the parties immediately affected. Certain it is that no court will again see the like of the unique Agreement nor the singularly well-documented history of conduct reviewed here.

The correctness of the decision on the merits is manifest. The language and substance of the Agreement, standing alone and in the context of the other agreements simultaneously made, are consistent only with the independent contractor relationship. This construction is fully corroborated by the acts of the parties themselves. That the Agreement did not grant, and the Corporation never exercised, any control of Donaldson's performance of the contract is the keynote to his status.

In the copyright registrations of the Songs, Donaldson was always identified as the individual author. The Agreement controlled the rights of the parties. Under these circumstances the "corporate body," the impersonal work, provision of Section 24 clearly has no application and the Court of Appeals properly so held.

There is here neither conflict of decision nor broad, significant question of Federal law which requires decision by this Court.

POINT I

The Court of Appeals properly held the Rule inapplicable to its determination of Donaldson's status.

Petitioner's primary argument is that the Court of Appeals did not have the power, by reason of the Rule, to reverse the Trial Court's holding that Donaldson was an employee for hire.

The determination of the legal character of Donaldson's status involved "a two-step process". (*In re Hygrade Envelope Corp.*, 366 F. 2d 584, 587 (2d Cir. 1966)). The Trial Court was first required to determine factually what the parties agreed to and did in the creation and performance of the relationship. It had then to formulate that standard of conduct which, in law, constitutes employment "for hire" within the meaning of Section 24 of the Copyright Act, and to apply to that standard the basic evidentiary facts found.

The Trial Court made no findings of fact or conclusions of law other than those which appear in its opinion (P.A. 1a-8a). All of the evidentiary facts recited therein were either agreed upon or documentary. Without citing in support any of the basic facts found, the Trial Court made the bare conclusion that Donaldson "deliberately chose to be an employee for hire" (P.A. 6a-7a), a choice wholly at variance with business experience and human nature. (See *Brown* v. *McGraw-Hill Book*, 25 AD 2d 317, 320 (1st Dept. 1966)).

On the basis of that conclusion and on "the total picture" (P.A. 8a), the Trial Court made the ultimate determination of Donaldson's legal status. No standard of conduct for testing the existence of the status was set forth. No affirmative finding of fact was made as to any act upon which the Court relied as indicative of, or conforming to a legal standard of conduct requisite for, employment for hire. At best, negative findings were made to the effect

that certain undisputed acts did not compel a determination contrary to that status (P.A. 7a).

A comparison of the basic facts found by the Trial Court (P.A. 1a-5a, 6a-7a) and those relied upon by the Court of Appeals (P.A. 10a-13a, 14a-16a) will show them to be virtually identical, as they need must be, since the facts were, in the main, agreed or documentary. It is only in the ultimate conclusion from those facts, made by the Court of Appeals in applying them to the legal standard of employment for hire, that a divergence occurs.

For the purpose of insuring uniformity of decision in the district, the Court of Appeals, on review, restated the minimum legal standard of conduct which it deemed indispensable to the existence of employment for hire within the meaning of Section 24 of the Copyright Act (P.A. 16a). It held that an employee for hire in that context meant a technical and "substantial" employment, the essential element of which is "the right of the employer 'to direct and supervise the manner in which the writer performs his work' (see Nimmer, Copyright, § 62.31 (1964))" and common evidence of which is a fixed compensation not constituting a loan.

The Court did not purport to make new law. Some control of the means and manner of performance is the traditional and uniform hall-mark of service for hire. (*Cf. Tobani* v. *Carl Fischer, Inc.*, 98 F. 2d 57, 59 (2d Cir. 1938), cert. denied, 305 U.S. 650; See *Shapiro, Bernstein & Co.* v. *Bryan*, 123 F. 2d 697 (2d Cir. 1941); *Fred Fisher Music Co., Inc.* v. *Leo Feist, Inc.*, 55 F. Supp. 359, 360 (S.D.N.Y. 1944); 56 *Corpus Juris Secundum*, Section 2, p. 33; *Law of Copyright, Copinger and Skone-James*, 9th Ed., p. 17; *Matter of Miller*, 262 App. Div. 385, 387 (3d Dept. 1941)). Applying, without change, the basic, undisputed evidentiary facts found below, the Court of Appeals held that the formulated standard of employment had not been met.

This Court has many times approved, (and, thus, there remains no room for conflict among the Circuits) the exercise of appellate review in applying a correct legal standard or in correcting findings where made by the lower courts under a misapprehension of the applicable law. (*United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394-395; *Baumgartner* v. *United States*, 322 U.S. 665, 670-671, citing *Beyer* v. *Le Fevre*, 186 U.S. 114; *United States* v. *Parke Davis & Co.*, 362 U.S. 29, 44-45; *Skelly Oil* v. *Phillips Petroleum Co.*, 339 U.S. 667; *Mamiye Bros.* v. *Barber SS. Lines, Inc.*, 360 F. 2d 774, 776-78 (2d Cir. 1966), cert. denied, 385 U.S. 835).

Whether the holding that the facts as found did not constitute employment for hire is one strictly of law (*Matter of Rheinwald* v. *Builders' Brick and Supply Co.*, 168 App. Div. 425, 431 (3d Dept. 1915)) or one of mixed law and fact (*Mitchell* v. *Strickland Transportation Company*, 228 F. 2d 124, 126 (5th Cir. 1955)) need not be decided.

As the Court of Appeals below recently said, on the question of notice of insolvency, in *In re Hygrade Envelope Corp.*, 366 F. 2d 584, 588:

> ". . . The scope of review might be better understood by recognizing that the imperatives of F. R. Civ. P. 52(a) and its analogues are avoided whenever the issue is not one of 'fact'; there is no necessity for going further and endeavoring to establish that it is one of 'law' . . . as we have recently noted, there are substantial reasons, particularly relating to consistency of decision, that dictate rather full review. *Maymiye Bros.* v. *Barber S.S. Lines, Inc.*, 360 F. 2d 774, 778 (2 Cir. 1966). To be sure an appellate court must respect findings of the trial judge as to what in fact happened and in addition should give due weight to his superior opportunity to acquire the true feel of the case. . . . But when the issue is his application of a legal standard to facts undisputed or reasonably found, reversal is not limited to results that are 'clearly erroneous'; it is

> enough that the appellate court should be convinced, as we are here, that the result does not jibe with the applicable rule of law.[4] ''

The footnote indicated in the quotation above is equally apt:

> ''Although reversal in such a case could often be deemed justified under the principle that the 'unless clearly erroneous' rule does not protect when the reviewing court has 'the definite and firm conviction that a mistake has been committed,' *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394-395, 68 S.Ct. 525, 542, 92 L. Ed. 746 (1948), clarity is promoted by recognizing that the application of a legal standard to the facts is not a 'finding of fact' within the rule.''

Since the contracting parties created and memorialized their relationships in the form of written agreements, surely those documents were of first importance in determining the legal character of those relationships. The execution and contents of the documents was undisputed. The Court of Appeals had an opportunity equal to that of the Trial Court to construe the Agreement, both standing alone and in the context of the other instruments contemporaneously made. (*Irvani* v. *Mottaghi*, 244 F. 2d 238, 248 (2d Cir. 1957), cert. denied, 354 U.S. 939; *Fahs* v. *Taylor*, 239 F. 2d 224, 226 (5th Cir. 1956), cert. denied, 353 U.S. 936).

The Trial Court did not purport to apply rules of construction to those documents, finding only that they presented a ''clouded picture'' (P.A. 6a) of Donaldson's status. The Court of Appeals was not foreclosed from looking behind the cloud to discern meaning and effect from the agreements actually made by the parties and their acts, equally well-documented, in the performance thereof.

Even the Ninth Circuit, in its exercise of the utmost limits of self-restraint, concedes the freedom of the appellate court to construe a contract, without ''indulging pre-

sumptions as to the interpretation below'' (*United Artists Corp.* v. *Strand Productions,* 216 F. 2d 305, 310 (9th Cir. 1954)).

Tyler v. *Lowe,* 138 F. 2d 867 (2d Cir. 1943), cited as authority contrary to the scope of the review exercised here, is readily distinguishable. In *Tyler,* the existence of the master-servant relationship was not at issue. The question there was only as to which of two persons was the employer. That determination was a pure question of the fact of identity, which did not require construction or the application of any legal standard. The Court held that on the basis of the record in that case, the finding of the Trial Court that the named defendant was not, as a matter of fact, the person who employed the plaintiff, could not be found to be clearly erroneous.

POINT II

The conclusions drawn by the Court of Appeals from the basic evidence below were correct.

Although the Court of Appeals held the Rule inapplicable to its determination, it is submitted that reversal of the Trial Court's ultimate conclusions would have been justified as being clearly erroneous.

1. The Language of the Agreement

From the outset of this action, counsel for the Corporation have assiduously avoided reference (with the exception of the one word ''employment'') to the language of the Agreement, standing alone or in the context of the contemporaneous agreements. There has never been even an attempt to explain the difference between the commital language of the Donaldson Agreement as against the other two, all of which stem originally from the single document, the first draft.

If all three parties were intended to have the same legal relationship to the Corporation, why, under the aegis of a skilled draftsman, were two clearly and unequivocally committed to enter into the employ and to render services, while the third, Donaldson, committed himself only "to enter into a contract" to write and compose exclusively for the Corporation? When the word "employment" was inserted in the pre-incorporation agreement, not one word was changed in the paragraph of the first draft which expressed Donaldson's undertaking. His obligation remained "to enter into a contract," the making of which was the stated consideration given by Donaldson for the assumption of the Corporation's obligations "during the term of your contract" (R.A. 8b, 9b, 10b).

It must also be asked why, if the Corporation, as an employer, would own all rights in all of the works to be composed, were only publication and mechanical rights granted—and those conditioned upon the payment of the royalties provided? As "author," under the Copyright Act, the copyright would automatically belong to an employer (17 U.S.C. § 26); yet the draftsman seemingly saw the necessity here expressly to confer upon the Corporation the right to obtain copyright.

The answers come readily with recognition that the Agreement was drawn as an exclusive publishing contract with an independent writer, in conformity with a well-established, judicially-recognized custom in the music industry.

> "In the music industry, the prevailing custom is that statutory copyright in sheet music is secured in the name of the publisher. The publisher then holds the copyright in trust for the composer with respect to all rights or portions of rights not transferred to the publisher." (Copyright Office Law Revision Study No. 11, p. 23.)

See also *April Productions* v. *G. Schirmer, Inc.*, 308 N.Y. 366, 369-370, 374-375 (1955); *Musical Copyright*, Alfred M.

Shafter (2d Ed., 1939), pp. 143-144; *Adolph Phillip* v. *Remick Music Co.*, (S.D.N.Y. 1936); E. 79-236. Opinion No. 9,999, Judge Bondy [not officially reported].

That this is so, is manifest from Mr. Schwartz' expression of opinion (he remembered nothing of the actual events), on reading the Agreement at the trial, as to its meaning and effect. He said (R. 157-158):

> "Your Honor, in this field, there are varying rights. There is [sic] dramatic rights, stage performing rights, motion picture rights, television rights, radio rights, recording rights, publication and mechanical rights.
>
> As I read this agreement, it was never intended that anything be conveyed except the mechanical and the publication rights. All the other rights were reserved and retained by the writer, that was the usual and customary procedure in the business.
>
> So that when he made a contract with Ziegfeld for the production of a show, the music, the mechanical and publication rights belonged ipso facto, according to this contract, forever to the corporation. But so far as the dramatic rights are concerned, the performing rights, the motion picture rights and all these other allied rights, they were retained by the writer. That was the usual and customary arrangement in the business, invariably so."

Contemporaneous corroboration that his understanding was the same at the relevant time is found in the Goldwyn agreement (R.A. 19b-22b, Pl. Ex. 9, R. 106), which Mr. Schwartz drew (and, at the trial, did not remember so doing (R. 135)).

In construing the Agreement and the legal relationship which it established, the Court of Appeals properly relied upon the entire agreement, and what the parties did in pursuance thereof (*Mitchell* v. *Strickland Transportation Company, supra*), rather than the label which the Corporation has consistently sought to stamp upon it by the single use of a single word.

2. The Absence of Control

From an examination of the Agreement itself, the Court of Appeals elicited the single most significant criterion in measuring Donaldson's status against the formulated standard of employment for hire. Neither expressly nor impliedly does the Agreement grant or reserve to the Corporation that *sine qua non* of "substantial" employment, the right to supervise or control Donaldson's creative work. The Corporation had not the right to direct when, where, what, if anything, or with whom he should write. Much less was there granted the right to assign control to others.

The reviewing Court, from the Agreement itself and perhaps the only certain testimony of both Douglas and Mr. Schwartz, could and did determine that Donaldson himself owned dramatic and synchronization rights. The Corporation had no obligation to pay for those rights, Donaldson received all of the compensation paid for those rights, and Donaldson himself paid out of his own royalties, on terms required to be approved by him, the royalties to which producers would become entitled for the publication and mechanical reproduction rights as to which, concededly, by specific grant, the Corporation had the exclusive rights.

Douglas testified unequivocally that the Corporation never claimed the power to commit Donaldson to write for the stage or screen and never did in fact make such a commitment except with Donaldson's consent (R. 259). Coupled with the absence of contractual right, this admission, it is submitted, is dispositive of the so-called "farm-out" of Donaldson's services as evidence of control.

That the Corporation would benefit indirectly from increased exploitation of its exclusive rights of publication and mechanical reproduction is obvious. It was, however, Donaldson's exclusive province to determine whether or not he would engage himself in writing for stage or screen.

In signing contracts with third parties, in Donaldson's name, Douglas clearly acted for Donaldson.

Mr. Schwartz (who, better than any other person, knew the legal relationship of the parties), just 18 months after making the Agreement, as attorney for Samuel Goldwyn, obtained the motion picture rights to the "Whoopee" songs only from Donaldson, for both the original and renewal terms of copyright. It is beyond belief that if Mr. Schwartz understood that the Corporation, the registered copyright owner, was the owner of a work made for hire, that he would not have required the Corporation's assignment to Goldwyn. He did not do so.

The statement in the Fox contract (Deft.'s Ex. EE, R. 228) that Donaldson and his co-author Leslie were the "employees" of the Corporation is a self-serving declaration which was not seen by Donaldson (R. 265). In none of the agreements which Donaldson himself signed did any such statement ever appear. Douglas testified that the power of attorney pursuant to which he acted for Donaldson was either a letter or a telegram (R. 224). Leslie, the other so-called "employee", testified that he had never seen the Agreement, that he was not an employee, nor had he ever been (R. 174). Douglas conceded that Leslie had not been an employee except for the twelve weeks covered by the Fox contract, that, in fact, the sole compensation paid to Leslie under that contract came from Fox, and that all expenses under that contract were paid either by Fox or by the composers themselves (R. 264).

With the collapse of the "farm-out" theory, Petitioner now urges that because of the creative character of Donaldson's work and his position in the Corporation, the failure of the Agreement to reserve even a semblance of supervisory direction and control is without significance. One need only look to the *Fox* agreement for an illustration of the degree to which creative talent is customarily supervised in true employment (R.A. 23b-24b, Dept. Ex. EE). (See also

Tobani v. *Carl Fischer, Inc., supra; Shapiro, Bernstein & Co.* v. *Bryan, supra*).

Donaldson alone had the right to decide if he would write for the stage or screen, (or, for that matter, what and how much, if anything, for the Corporation) and he alone had the right to determine whether or not he would have collaborators and who they should be. Payments to collaborators and producers were made from Donaldson's royalties, on terms expressly subject to his approval. He had the right to withdraw his royalties as and when he desired (R.A. 14b). It is difficult to conceive of a greater degree of freedom and independence.

3. The Oral Testimony

Petitioner seeks to overcome the effect of the documentary evidence by reliance upon the testimony of Mr. Douglas and Mr. Schwartz.

At the time of trial, Douglas, then 75 years old, was, and for 27 years past had been, employed by Music Publishers Protective Association, of which Jack Bregman, President of the Corporation, was one of the nine directors who voted on his salary (R. 281-282).

The totality of Douglas' testimony as to the intended meaning of the Agreement was a single statement (R. 370) to the effect that the parties told Mr. Schwartz, at their first meeting, to make employment agreements for all. The first draft, which was the result of that first meeting, has remained unaffected by the passage of time. The document so directly contradicts Douglas' testimony of the alleged instructions as to make his version of the events implausible.

That not one word of Donaldson's supposed "employment" appears in the first draft, nor even in the marginal corrective notes, is a permanent record that employment was not discussed, not intended and not so agreed.

The probative value of Mr. Schwartz' testimony may be judged from the fact that on seven different occasions (R.A. 26b-28b, R. 135, 136, 141, 142, 147, 155, 162) he stated that he had no independent recollection of any of the relevant events, the meetings, the intention of the parties or what was in his own mind. His "testimony" (misleadingly quoted, in the Petition, entirely out of context) consisted of opinions reluctantly given at the prodding of the Court. More convincing and reliable than Mr. Schwartz' recent hypotheses is what he did in relation to the Goldwyn contract at the time, with the certain knowledge he then had.

Powers' testimony, by deposition, related alleged conversations of more than 30 years before. Aside from the inherent unlikelihood that the incidents occurred in the precise manner reported, Mr. Powers' purported verbatim recall after so many years is suspect on that ground alone.

In evaluating the weight to which the oral testimony was entitled, it is submitted that the Court of Appeals was, as in *United States* v. *Fay*, 353 F. 2d 56, 59 (2d Cir. 1965), guided by the caveat of this Court.

> "Common sense tells us that when the . . . pan is filled with probative documentary evidence, only the strongest contrary oral testimony could prevail, especially when proferred by an interested party as to occurrences of long ago. As the Supreme Court itself has said, in a civil case governed by the preponderance standard 'Where . . . testimony is in conflict with contemporaneous documents we can give it little weight.' *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 396, 68 S. Ct. 525, 542, 92 L. Ed. 746 (1948)."

4. Compensation

During the course of this litigation the Corporation's theories as to the "weekly drawing account" have run the gamut from salary, to guaranteed weekly non-returnable advances, and now finally to that of a guaranteed minimum of income over the term of the contract.

Since the payments stopped a year and half before the end of the term, they certainly were not salary in the traditional sense. They were not guaranteed weekly advances, because even if Donaldson were overdrawn, future advances would at least have been required to have been credited against the overdraw. This, of course, was not done. Only actual earned royalties were credited. That the drawing account was not intended to be a guaranteed minimum is evidenced by the fact that although by February, 1931, Pl. Ex. 11, pp. 93-94) Donaldson had drawn some $7,000 more than the so-called guaranteed minimum of $124,800, the Corporation continued to pay the weekly draw until November, 1931. Douglas conceded that Donaldson would have continued to get the payments if the Corporation had the money (R. 271).

The fact is that Donaldson was entitled only to his earned royalties. Everything over that amount was a loan which had to be repaid, and at the end of the term, the outstanding $12,000 overdraw, on threat of possible suit (Pl. Ex. 15, R. 278), was repaid by the surrender of Donaldson's stock.

POINT III

The Corporation was the exclusive licensee of publication and mechanical rights and held the copyright in trust for Donaldson for the purposes of the Agreement.

Petitioner questions the character of its rights under the determination that Donaldson was an independent contractor and claims that, even if it is deemed an assignee, it would have all rights (albeit not renewal rights), in the Songs because of the absence of any reservation of rights by Donaldson.

Under the Agreement, the Corporation was the exclusive licensee of the publication and mechanical rights and

under the prevailing custom in the industry (pages 17-18, *supra*), held the copyright as trustee for Donaldson as to all other rights.

It is conceded that whatever foreign rights Donaldson may have had under the Agreement, he consented to the grants made to foreign publishers by the Corporation, since that obviously was the plan by which the Corporation was to be financed. No claim has been made here to disturb the foreign grants or the rights of the Corporation thereunder. The claim is confined solely to the United States renewal copyrights.

Whatever was the Corporation's participation in performance fees from ASCAP derived from its membership in that society, as a publisher member. No writer can control the payments of the publisher's share of performance fees under the rules of that organization, to which both parties, as members, were subject.

POINT IV

The corporate body provisions of the Copyright Act are inapplicable.

The authorities are unanimous in the view that the statutory provision with respect to the right of a corporate body to renew as proprietor (17 U.S.C. § 24) is, for all practical purposes, meaningless; that if it has any possible application, it is intended for that class of blended works, the individual contributions to which are impossible of identification. (Hon. Learned Hand, in *Shapiro, Bernstein & Co., Inc.* v. *Bryan,* 123 F. 2d 697 (2d Cir. 1941); *Copyright Office Law Revision Study No. 31,* pp. 134-137; *Nimmer On Copyright,* 1967, § 114.3, p. 468). Donaldson was, in every instance, specifically identified by the Corporation in its own copyright registration as the author of the works composed by him.

Petitioner contends that because Donaldson played some of the Songs on a piano owned by the Corporation and some of the Songs were physically notated by arrangers paid by the Corporation, the Songs became corporate works. Never were the arrangers, these ministerial, musical secretaries, named in a claim to copyright as a co-author, nor did the Corporation claim copyright as the proprietor of a corporate-body work.

The parties did not rely, for the determination of their rights, upon this amorphous statutory provision (which, as to new works, has been eliminated entirely in the proposed new Copyright Act. See H.R. 4347 § 302). They sought to fix their rights by express contract, the Agreement, which would be rendered academic by implication of the statute. As it is said, *expressum facit cessare tacitum*—"that which is expressed make that which is implied to cease [that is, supersedes it, or controls its effect]." (Black's Law Dictionary, 3d Ed., p. 727.)

It may be noted that in commending to the Court's consideration the importance of the issue here to the industry, Petitioner has referred to the broad scope of corporate ownership of copyrights, citing *Howell's Copyright Law* (p. 53, Rev. Ed., 1962), [Petitioner's Brief, p. 15]. The reference omits a significant part of *Howell's* statement.

> "A survey of the practices in the first half of 1955 indicated that claims to copyright in about 92% of motion pictures, 93.7% of periodicals and 38.8% of all works, *were registered by corporate or other legal entities as 'authors'*." (Emphasis ours.)

There is no question of the rights of employers of works truly made for hire, and it would appear that, when there is substantial employment, the large number of employers leave no doubt as to their rights and, as provided by the statute, claim to copyright is made by them "as authors". Unlike those employers cited in the

survey, never once during the entire five year term of the Agreement did the Corporation claim a copyright as author. Presumably it did not at the time deem itself entitled so to do.

It is submitted that Donaldson was an independent contractor, for which reason the claims to copyright affirmed his status as author and preserved for his children the birthright which Congress saw fit to grant them.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition herein for a writ of certiorari should be denied.

Respectfully submitted,

LEWIS A. DREYER,
1619 Broadway,
New York, New York 10019.

NORMA HACK,
ROSEN, SETON & SARBIN,
Of Counsel.

APPENDIX

Excerpts from Pre-Trial Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

(R. pp. 50-54)

DONALDSON PUBLISHING CO.,

Plaintiff,

against

BREGMAN, VOCCO AND CONN, INC.,

Defendant.

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* * *

2. The parties agreed that the trial of this action shall be based upon this order and upon the pleadings as amended, except that the following issues raised by the pleadings are expressly abandoned: None.

3. (a) The parties stipulated that the following facts are not in dispute in this action (each party reserving the right to object to the materiality of any such stipulated fact and its relevance to the issues):

(i) Walter Donaldson and defendant (under its then corporate title, Donaldson, Douglas & Gumble, Inc.) entered into an agreement dated May 15, 1928. All of the musical compositions written in whole or in part by Walter Donaldson during the term of the said agreement were delivered to Donaldson, Douglas & Gumble, Inc.

(ii) Defendant caused said Agreement of May 15, 1928 to be recorded in the Copyright Office Records of Assignments and Related Documents (Volume 910, Pages 119-124) on June 4, 1954, and there was annexed to said Agreement, when recorded, a Schedule of Compositions which had been prepared by defendant.

Excerpts from Pre-Trial Order

(iii) In said Schedule of Compositions are set forth the names of the eighty-seven compositions which were written by Walter Donaldson, either alone or with Edgar Leslie, Gus Kahn or Joe Young, and which were copyrighted by defendant in its own name between May 28, 1928 and April 12, 1933, both dates inclusive, and the said eighty-seven compositions are the same as the eighty-seven compositions which are set forth in the pleadings herein.

(iv) The publication rights and mechanical reproduction rights of defendant in said musical compositions (which said rights are mentioned in paragraph numbered 5 of said Agreement), were subject to the payment by defendant of the royalties specified in said Agreement. During the five-year period of the Agreement, defendant rendered statements to Walter Donaldson, which statements were identified on pre-trial examination of Walter Douglas as Exhibits "P-1" through "P-9". It is conceded that said statements were delivered to Walter Donaldson and that the royalty payments indicated as due thereon to Walter Donaldson were paid.

(v) All of the eighty-seven compositions mentioned in said Schedule of Compositions were duly copyrighted by defendant in its own name (under its former corporate title, Donaldson, Douglas & Gumble, Inc.) and such copyrights were duly registered in the U. S. Copyright Office by defendant under its said former corporate title under the respective dates of publication or dates of registration set forth in said Schedule of Compositions.

(vi) Walter Donaldson died prior to the expiration of 27 years after the commencement of the first term of copyright of said compositions or any of them.

(vii) Walter Donaldson was not survived by a widow in the ordinary sense but was survived by a divorced wife, namely, Dorothy Donaldson.

(viii) Walter Donaldson was survived by only two (2) children, who are Ellen Bernice Donaldson (married name, Kerslake), and Sheila Lynn Donaldson (married name, Shea).

(ix) Within one (1) year prior to the expiration of the original term of each of the 95 copyrights in said eighty-seven compositions (the details concerning said copyrights being set forth in said Schedule of Compositions), the said children of Walter Donaldson, made application to the U. S. Copyright Office for the renewal and extension of each of said copyrights for the further term of 28 years, and each such application was duly registered in the U. S. Copyright Office within said year prior to the expiration of the original term of copyright. Similarly, defendant made application to the United States Copyright Office for the renewal and extension of said copyrights, which applications were duly registered in the United States Copyright Office.

(x) The photocopies annexed as Exhibit "5" of the affidavit Charles B. Seton submitted and filed in support of plaintiff's motion for summary judgment herein, are photocopies of each of the 95 Certificates of Registration of A Claim To The Renewal Of A Copyright with respect to the eighty-seven compositions set forth in said Schedule of Compositions, signed, sealed and issued by the Register of Copyrights, evidencing that said two children of Walter Donaldson had made applications to the U. S. Copyright Office for the renewal and extension of the copyrights in said eighty-seven compositions and had made the claims and statements in said applications which are set forth in said 95 Certificates of Registration.

(xi) Said Ellen Bernice Donaldson (married name, Ellen Bernice Kerslake) entered into the agreements with plaintiff and executed the assignments to plaintiff, copies of which are annexed as Exhibits "A", "B" and "C" respectively, to the affidavit of Ellen Bernice Kerslake, submitted and filed in support of plaintiff's motion for summary judgment herein.

(xii) Said Sheila Lynn Donaldson (married name, Sheila Lynn Shea) entered into the agreement with plaintiff and executed the assignment to plaintiff, copies of which are annexed as Exhibit "A", and as Exhibit 1 of Exhibit

"B" (pages 4-7 of Exhibit "B"), to the affidavit of said Ellen Bernice Kerslake, submitted and filed in support of plaintiff's motion for summary judgment herein.

(xiii) Walter Donaldson and Gus Kahn wrote the nine compositions, whose titles are set forth in Schedule "B" annexed to the Second Amended Complaint (and are also contained in said Schedule of Compositions).

(xiv) Defendant entered into an agreement with Florenz Ziegfeld, dated November 21, 1928, a copy of which, marked Exhibit "Y", was identified by Walter G. Douglas in his deposition taken herein by defendant on December 2, 1959. (Said agreement is hereinafter referred to as "Ziegfeld Agreement".

(xv) The dramatico-musical composition entitled "Whoopee", is the dramatico-musical composition which is referred to in said Ziegfeld Agreement.

(xvi) That Nathan Burkan, Esq. was the attorney for Donaldson, Douglas & Gumble, Inc., and that Charles Schwartz, Esq. of that firm was the actual draftsman of:

(aa) The Agreement of May 15, 1928.

(bb) A paper labeled "The First Draft" in the handwriting of Charles Schwartz, Esq., of the pre-incorporation agreement between Walter Donaldson and the Messrs. Douglas and Gumble, dated April 23, 1928, a copy of which was marked as plaintiff's Exhibit "SA" for identification on the deposition of Charles Schwartz herein.

(cc) The Agreement of May 4, 1928, between Walter Donaldson and the Messrs. Douglas and Gumble (defendant's Exhibit "S2" for identification on the deposition of Charles Schwartz).

(xvii) That by instrument dated June 8, 1933, Walter Donaldson sold and transferred to Donaldson, Douglas & Gumble, Inc. his total stock interest in that corporation amounting to thirty-three and one-third (33⅓) shares of common stock.

• • •

Court Exhibit 1

(ADMITTED AT PAGE 99 OF RECORD)

PROPOSED STIPULATIONS FOR TRIAL

1. Walter Donaldson, either alone or with Gus Kahn, Edgar Leslie or Joe Young, during the period between May 28, 1928 and April 12, 1933, wrote 87 musical compositions which are set forth in the schedule annexed to the complaint. The said 87 compositions are the subject of 95 copyright registrations, all of which were duly filed in the Office of the Register of Copyrights in the name of Donaldson, Douglas & Gumble, Inc. as copyright owner, and in which Walter Donaldson is named as a sole or as a co-author.

2. Walter Donaldson died July 15, 1948, prior to the expiration of the 27th year of the respective original terms of copyright, survived by two daughters, namely Ellen Bernice Donaldson (now Kerslake) and Sheila Lynn Donaldson (now Shea).

3. As to all of said 95 copyrights in the 87 compositions, in the last year of the respective original terms of copyright, applications for renewal of copyright were filed both by defendant, claiming as employer for hire of Walter Donaldson, and by the two daughters of Walter Donaldson, claiming as the children of the author.

4. Plaintiff is at this date the assignee of all right, title and interest, if any, of the children of Walter Donaldson in and to the renewal copyrights at issue, and all claims and demands with respect thereto. There is expressly reserved for any accounting or other proceeding herein the issues raised by defendant as to the dates on which the assignments to plaintiff became effective, and the applicability thereto of the defenses of the statute of limitations, laches and real party in interest.

Plaintiff's Exhibit 2

(Admitted at Page 100 of Record)

(Photostats)

(See opposite ☛)

(Hand-Written Marginal Notes Appearing Illegible on Reproductions, Appear as Follows on Original)

"production 8¢ producer"

"the corporation shall arrange to pay to other collaborators their compensation or royalty, such compensation or royalty to be paid out of the sums payable to you hereunder but all such compensation or royalty payable to such collaborators shall be subject to your approval."

"Drawing a/c 300. a week for 1st six months. 500 a week for balance of term."

"5 y for each of you. If any get out $5,000."

"Death—fair appraisal value 50%."

PLAINTIFF'S EXHIBIT 2

April 22nd, 1926.

Mr. Walter Donaldson.

Dear Mr. Donaldson,

The following is our agreement:

1. You and we agree to promptly cause to be organized under the laws of New York a corporation under the name of Walter Donaldson, Inc. Music Publishers, or if that name is not available, such other name as we mutually agree upon, such corporation to have a capitalization of 100 shares of no par value, to conduct the business of music publishers, the provisions of the Certificate of Incorporation to give such corporation the broadest powers incidental to the conduct and operation of a music publishing business.

2. The corporation is to have three directors consisting of you and ourselves.

As soon as the Board of Directors is elected, we agree to appoint as officers the following:

You to be the President,
Douglas to be the Vice-President and Treasurer,
Gumbel to be the Secretary.

3. You agree, promptly upon the formation of the corporation, to enter into a contract with the corporation upon the following terms:

You agree to write and compose musical works for the corporation exclusively, for a period of ten years from the date of the incorporation of the company.

In consideration of your making such contract, the corporation will agree to deliver to you one-third of its entire capital stock, and to pay you the following royalties:

A sum equal to 10% of the retail market price of all music written or composed by you which is sold by the company, your royalty, however, to be in no event less than 2¢ for and upon each and every copy of sheet music of such musical works sold in the United States and Canada. You are also to receive 50% of all moneys collected by us from the mechanical reproduction of any such works.

You are also to receive one-half of all moneys collected by us as foreign royalties whether because of the publication of such works in foreign countries or because of their mechanical reproduction.

If you have any collaborators in any such works, the collaborators will be compensated by you out of your royalties aforesaid.

The corporation shall monthly during the term of your contract deposit in a special account to be known as the "Royalty

Account" all royalties which have become payable to you during each such current month, and you shall have the right to withdraw such royalties deposited in such account as and when you may desire so to do.

All publication and mechanical reproduction rights in your musical works written and composed during the term of your contract with the corporation, shall be and vest in the corporation immediately upon the creation of such musical works by you, subject, of course, to the payment to you of the royalties above specified, and the corporation shall have the right to secure copyright in its name in all such works.

The corporation will obligate itself to print and publish in first class style such of your musical works as they may deem suitable for publication and for which they believe there will be a public demand, and the corporation will agree to use its best efforts to introduce such musical works into the general market and to popularize and create a demand for the same.

4. Douglas agrees to enter into the employ of the corporation promptly after its incorporation, as Business Manager, and he is to agree to devote himself exclusively to the rendition of his services to the corporation. He is to receive for his services $200. per week. He is also to subscribe and pay for one-third of the capital stock of the corporation, the price to be fixed by the Board of Directors at a nominal amount.

5. Gumble agrees to enter into the employ of the corporation promptly after its incorporation, as Professional Manager, and he is to agree to devote himself exclusively to the rendition of his services to the corporation. He is to receive for his services $250. per week. He is also to subscribe and pay for one-third of the capital stock of the corporation, the price to be fixed by the Board of Directors at a nominal amount.

6. The term of employment of Douglas and Gumble shall continue only so long as each such respective party shall be a stockholder of the corporation. If at any time either such party shall cease to be such stockholder, then from and after such date the employment of such party by the corporation shall cease and come to an end.

7. In the event either Douglas or Gumble shall cease to be a stockholder of the corporation at any time prior to the expiration of the ten year term of contract between the corporation and Donaldson, then upon such person ceasing to be a stockholder of the corporation, Donaldson shall have the right to terminate his contract with the corporation, and the ten year period of his contract shall be shortened to the foregoing extent.

8. The By-laws of the corporation are to contain a provision that stock of the company shall not be assignable or transferable or otherwise disposed of unless and until the

stockholder desiring to transfer or dispose of the same shall first offer the same to the remaining stockholders at the book value of such stock at the time such selling stockholder shall offer to sell the same, and the remaining stockholders shall have sixty days from and after the date such selling stockholder shall offer to sell such stock within which to purchase the same. If both remaining stockholders shall desire to purchase such stock, they shall be entitled to acquire such stock so offered for sale pro rata. If neither of the remaining stockholders shall desire to purchase such stock offered for sale within the above mentioned sixty day period, then the stock offered for sale shall be freed and released from the restriction hereinabove contained.

9. The depositary of the company shall be the Bowery & East River National Bank. Checks are to be signed by the Treasurer and countersigned by the Secretary.

Your signature at the foot hereof underneath the word "Accepted" will make this a binding agreement between us.

Very truly yours,

. . . . . .
Walter Douglas

. . . . . .
Rose Gumble

ACCEPTED:

. . . . . .
Walter Donaldson

Plaintiff's Exhibit 3

(Admitted at Page 101 of Record)

May 4th, 1928.

Mr. Walter Donaldson.

Dear Mr. Donaldson,

The following is our agreement:

1. You and we agree to promptly cause to be organized under the laws of New York a corporation under the name of Walter Donaldson, Inc. Music Publishers, or if that name is not available, such other name as we mutually agree upon, such corporation to have a capitalization of 100 shares of no par value, to conduct the business of music publishers, the provisions of the Certificate of Incorporation to give such corporation the broadest powers incidental to the conduct and operation of a music publishing business.

2. The corporation is to have three directors consisting of you and ourselves.

As soon as the Board of Directors is elected, we agree to appoint as officers the following:

You to be the President,
Douglas to be the Vice-President and Treasurer,
Gumble to be the Secretary.

3. You agree, promptly upon the formation of the corporation, to enter into a contract with the corporation upon the following terms:

You agree to write and compose musical works for the corporation exclusively, for a period of five years from the date of the incorporation of the company.

In consideration of your making such contract, the corporation will agree to deliver to you one-third of its entire capital stock, and to pay you the following royalties:

Plaintiff's Exhibit 3

A sum equal to 10% of the retail price of all music written or composed by you which is sold by the company, subject to the proviso that your royalty shall in no event be less than 3¢ for and upon each and every copy of sheet music of such musical works sold in the United States and Canada, subject to the further proviso that with respect to production numbers your royalties shall in no event be less than 8¢ for and upon each and every copy of sheet music thereof sold in the United States and Canada. You are also to receive 50% of all moneys collected by us from the mechanical reproduction of any such works in the United States and Canada.

You are also to receive one-half of all moneys collected by us as foreign royalties whether because of the publication of such works in foreign countries or because of their mechanical reproduction.

If you have any collaborators in any such works, the corporation shall arrange for and pay to such collaborators their compensation or royalty, such compensation or royalty to be paid out of the sums payable to you hereunder, but the amount of such compensation or royalties payable to such collaborators shall be subject to your approval. Furthermore, in the case of production numbers, the corporation shall arrange for and pay to the producer of the musical plays containing such production numbers the compensation or royalty, if any, which may be payable to him on account of the publication or mechanical reproduction of any such production numbers, such compensation or royalty to be paid out of the sums payable to you hereunder, but the amount of such compensation or royalty shall be subject to your approval.

The corporation shall monthly during the term of your contract deposit in a special account to be known as the "Royalty Account" all royalties which have become pay-

able to you during each such current month, and you shall have the right to withdraw such royalties deposited in such account as and when you may desire so to do.

You shall have a drawing account against your royalties of $300. per week during the first six months of your employment, and of $500. per week during the balance of the term. The corporation shall have the right to deduct such drawings from any royalties that may have theretofore or that may thereafter accrue to you.

All publication and mechanical reproduction rights in your musical works written and composed during the term of your contract with the corporation, shall be and vest in the corporation immediately upon the creation of such musical works by you, subject, of course, to the payment to you of the royalties above specified, and the corporation shall have the right to secure copyright in its name in all such works.

The corporation will obligate itself to print and publish in first class style such of your musical works as they may deem suitable for publication and for which they believe there will be a public demand, and the corporation will agree to use its best efforts to introduce such musical works into the general market and to popularize and create a demand for the same.

4. Douglas agrees to enter into the employ of the corporation for a period of five years from the date of its incorporation, as Business Manager, and he is to agree to devote himself exclusively to the rendition of his services to the corporation. He is to receive for his services $300. per week. He is also to subscribe and pay for one-third of the capital stock of the corporation, the price to be fixed by the Board of Directors at a nominal amount.

5. Gumble agrees to enter into the employ of the corporation for a period of five years from the date of its incor-

poration, as Professional Manager, and he is to agree to devote himself exculsively to the rendition of his services to the corporation. He is to receive for his services $300. per week. He is also to subscribe and pay for one-third of the capital stock of the corporation, the price to be fixed by the Board of Directors at a nominal amount.

6. The By-Laws of the corporation are to contain a provision that stock of the company shall not be assignable or transferable or otherwise disposed of unless and until the stockholder desiring to transfer or dispose of the same shall first offer the same to the remaining stockholders for the sum of $5,000. for his one-third of the capital stock, and the remaining stockholders shall have sixty days from and after the date such selling stockholder shall offer to sell such stock within which to purchase the same. If both remaining stockholders shall desire to purchase such stock, they shall be entitled to acquire such stock so offered for sale pro rata. If neither of the remaining stockholders shall desire to purchase such stock offered for sale within the above mentioned sixty day period, then the stock offered for sale shall be freed and released from the restriction hereinabove contained.

In the event of the death of any stockholder, then the executor, administrator, legatee or other party succeeding in law to title in such stock by reason of such death shall not have the right to assign, transfer or otherwise dispose of such stock excepting only as follows: The corporation on behalf of the remaining stockholder or stockholders shall have the right to purchase such stock at 50% of its fair appraised value as of the date of death, such option to be exercised by written notice given to the executor or administrator of the estate within 120 days from and after their respective appointment. In case such option shall not be exercised within such period, then upon the expiration of such 120 day period, such stock shall be freed and released

from any restrictions, and shall be transferable, assignable or otherwise disposed of, free from any further restriction.

In case, however, the corporation shall exercise such option, then within ten days after the exercise of such option the corporation shall appoint one appraiser, and the executor and administrator shall appoint another appraiser, and the two appraisers shall within ten days thereafter agree upon a third appraiser. The three appraisers shall proceed with all diligence to appraise the fair value of the stock, and the affirmative decision of at least two out of the three appraisers as to such fair value shall be deemed to be the appraised value of such stock, upon which the 50% to be paid for such stock shall be computed. Such stock shall be paid for by the corporation on behalf of the remaining stockholder or stockholders within ten days after receipt by the corporation of the written decision of a majority of the appraisers fixing such appraised value. In case of the failure of either party to appoint its respective appraiser, or in case of the failure of the two to agree upon the third appraiser, then such appraiser shall be appointed in the manner to be fixed by the By-Laws of the corporation as prepared by counsel for the corporation.

9. The depositary of the company shall be the Bowery & East River National Bank. Checks are to be signed by the Treasurer and countersigned by the Secretary.

Your signature at the foot hereof underneath the word "Accepted" will make this a binding agreement between us.

Very truly yours,

(Signed) Walter G. Douglas
WALTER G. DOUGLAS

(Signed) Mose Gumble
MOSE GUMBLE

Accepted:

(Signed) Walter Donaldson
WALTER DONALDSON

Plaintiff's Exhibit 4

(Admitted at Page 101 of Record)

New York, May 15, 1928.

Mr. Walter Donaldson
1595 Broadway
New York City.

Dear Mr. Donaldson:

The following is our agreement:

1. You hereby agree to write and compose musical works for us exclusively for the period of five (5) years commencing with the date hereof.

2. In consideration of the execution and delivery of this agreement by you, we agree to issue and deliver to you one-third (⅓) of our entire capital stock, to wit, 33⅓ shares fully paid and non-assessable.

We also agree to pay you the following royalties:

A sum equal to ten percent (10%) of the retail price of all music written or composed by you, sold by us, subject to the proviso that your royalties shall in no event be less than three cents (3¢) for and upon each and every copy of sheet music of such musical works sold in the United States and Canada, and subject to the further proviso that with respect to production numbers your royalties shall in no event be less than eight cents (8¢) for and upon each and every copy of sheet music thereof sold in the United States and C nada.

You shall also receive fifty percent (50%) of all moneys collected by us from the mechanical reproduction of any such works in the United States and Canada.

You shall also receive one-half (½) of all moneys collected by us as foreign royalties whether because of the

publication of such works in foreign countries or because of their mechanical reproduction.

If you shall have any collaborators in any such works, we will arrange for and pay to such collaborators their compensation or royalty, such compensation or royalty to be paid out of the sums payable to you hereunder, but the amount of such compensation or royalty payable to such collaborators shall be subject to your approval.

In the case of production numbers, we shall arrange for and pay to the producer of the musical plays containing such production numbers, the compensation or royalty, if any, which may be payable to such producer on account of the publication or mechanical reproduction of such production numbers, such compensation or royalty to be paid out of the sums payable to you, but the amount of such compensation or royalty shall be subject to your approval.

3. We agree, during the term of this contract, to deposit in a special account to be known as the "Royalty Account", all royalties which have become payable to you during each calendar month, and you shall have the right to withdraw such royalties deposited in such account as and when you may desire so to do.

4. You shall have a drawing account against your royalties of Three Hundred ($300.) Dollars per week during the first six months of your employment, and of Five Hundred ($500.) Dollars per week during the balance of the five-year term hereof.

We shall have the right to deduct such drawings from any royalties that may have theretofore or that may thereafter accrue to you.

5. All publication and mechanical reproduction rights in your musical works written and composed during the

five-year term hereof, shall be and vest in us immediately upon the creation of such musical works by you, subject to the payment to you of the royalties above specified, and we shall have the right to secure copyright in our name in all such works.

6. We agree to print and publish in first-class style such of your musical works as we may deem suitable for publication and for which we believe there will be a public demand, and we agree to use our best efforts to introduce such musical works into the general market and to popularize and create a demand for the same.

Your signature at the foot hereof underneath the word "Accepted", will make this a binding agreement between us.

Yours very truly,

DONALDSON, DOUGLAS & GUMBLE, INC.

By WALTER G. DOUGLAS,
Treasurer.

ACCEPTED:

I hereby accept the above and agree to become bound thereby and to carry out and perform all the terms and conditions thereof on my part to be kept and performed.

WALTER DONALDSON L.S.

Plaintiff's Exhibit 5

(Admitted at Page 102 of Record)

New York, May 15, 1928.

Mr. Walter G. Douglas
1595 Broadway
New York City.

Dear Mr. Douglas:

The following is our agreement:

1. We hereby employ you, and you hereby enter into our employ, for a period of five (5) years from the date hereof, as business manager.

2. You agree to devote yourself exclusively to the rendition of your services to us.

3. We agree to pay you for your services the sum of Three Hundred ($300.) Dollars per week.

Your signature at the foot hereof underneath the word "Accepted", will make this a binding agreement between us.

Yours very truly,

Donaldson, Douglas & Gumble, Inc.

By Walter Donaldson
President

Accepted:

I hereby accept the above and agree to become bound thereby and to carry out and perform all the terms and conditions thereof on my part to be kept and performed.

Walter G. Douglas L.S.

Plaintiff's Exhibit 6

(Admitted at Page 103 of Record)

New York, May 15, 1928.

Mr. Mose Gumble
1595 Broadway
New York City.

Dear Mr. Gumble:

The following is our agreement:

1. We hereby employ you, and you hereby enter into our employ, for a period of five (5) years from the date hereof, as professional manager.

2. You agree to devote yourself exclusively to the rendition of your services to us.

3. We agree to pay you for your services the sum of Three Hundred ($300.) Dollars per week.

Your signature at the foot hereof underneath the word "Accepted", will make this a binding agreement between us.

Yours very truly,

Donaldson, Douglas & Gumble, Inc.

By Walter Donaldson
President

Accepted:

I hereby accept the above and agree to become bound thereby and to carry out and perform all the terms and conditions thereof on my part to be kept and performed.

Mose Gumble L.S.

Plaintiff's Exhibit 7

(Admitted at Page 103 of Record)

Excerpts

MEMORANDUM AGREEMENT made and entered into this 24th day of August, 1928, by and between Florenz Ziegfeld, Jr., of the City, County and State of New York, hereinafter referred to as the "Manager", party of the first part, and Walter Donaldson, of the same place, hereinafter referred to as the "Composer" and Gus Kahn, of the same place, hereinafter referred to as the "Lyricist", parties of the second part,

* * *

Whereas, the Composer and Lyricist are willing to write respectively the musical score and lyrics of the said proposed dramatico-musical play adapted from the said dramatic composition "The Nervous Wreck" and to grant to the Manager the exclusive right to the use of the said musical score and lyrics in connection with the said play throughout the world under the conditions hereinafter contained,

* * *

Eighth: In the event of the acceptance of the said music and lyrics by the Manager, the Manager shall have and receive the exclusive right to use the same in accordance with the terms of this agreement and for all times and for any and all purposes. . . .

* * *

Tenth: Composer and Lyricist covenant and agree that the said music and lyrics shall be drawn from original sources and/or the dramatic composition "The Nervous Wreck" and shall not infringe upon the rights or works of any other person, persons, firm or corporation and they do warrant that they will be the sole and exclusive owners of the right, license and privilege to authorize the Manager

to use the music and lyrics with all of the said purposes and that no other person, firm or corporation shall have the right to interfere in any wise in the full enjoyment and use by the Manager of the said music and lyrics. . . .

* * *

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written.

WALTER DONALDSON

GUS KAHN

FLORENZ ZIEGFELD, JR.

Plaintiff's Exhibit 9

(ADMITTED AT PAGE 106 OF RECORD)

Excerpts

MR. SAMUEL GOLDWYN,
729 Seventh Avenue,
New York, N.Y.

Dear Sir:

The following is our agreement:

1. We hereby grant, sell, assign and set over to you, forever, the entire motion picture and sound and talking motion picture rights (all such rights being hereinafter included and embraced in the expression "motion picture rights"), for the entire world, in and to the musical play entitled *"Whoopee"*, written as follows: Book by William Anthony McGuire, Lyrics by Gus Kahn and Music by Walter Donaldson (all hereinafter referred to as the

"Authors"), the title and theme thereof (including the book, lyrics and music and each and every other part thereof) exclusively, together with all of the benefits of the copyrights in such work and of all remedies for enforcing such copyrights with respect to such motion picture rights, and we hereby also grant, sell, assign and set over to you, forever, our entire right, title and interest in the motion picture rights, as that expression is herein used, in the dramatic composition entitled "THE NERVOUS WRECK", upon which "Whoopee" is based and in the story entitled "THE WRECK", upon which such dramatic composition "The Nervous Wreck" is based.

We hereby grant to you the exclusive right to make motion picture versions and sound and talking motion picture versions of such work (all such versions being hereinafter included and embraced in the expression "motion picture versions"), to adapt, arrange, change, transpose, add to and subtract from the said work and the title thereof to such extent as you may deem expedient, to use excerpts from such work for the titles, subtitles, text and dialogue of such motion picture versions, to publish, for the purpose of advertising and exploiting such motion picture versions, in such form as you may deem advisable, including its publication in newspapers, fan magazines and trade periodicals, a synopsis or story of such motion picture versions, not exceeding, however, ten thousand words in length, and to use excerpts from such work in heralds, programs, booklets, posters, lobby displays, press books and any and all other mediums of advertising and publicity whatsoever, and the exclusive unlimited and unrestricted right to produce, reproduce, distribute, exhibit and otherwise exploit and dispose of such motion picture versions, and to secure copyright and copyright registration therein in all countries of the world in your name or otherwise.

* * *

Plaintiff's Exhibit 9

2. We warrant that we are the sole owners of the motion picture rights in said work and have full right and authority to grant the rights hereby conveyed. We further warrant that the aforesaid work is original with the said Authors in all respects, that no incident therein contained and that no part thereof was taken from or based upon any other literary or dramatic work or any motion picture, or in any way infringes upon the copyright or the literary, dramatic or motion picture rights of any party whomsoever, except insofar as the same is based upon the above mentioned dramatic composition "The Nervous Wreck"; that such work has been duly copyrighted in the United States; . . . that the motion picture rights of such work have in no way been sold, mortgaged or otherise disposed of and are free and clear of any liens or claims whatsoever in favor of any party whomsoever; that the reproduction and exhibition of such work in the form of motion picture versions will not in any way infringe upon any rights of any party whomsoever; that we have done no act or thing that can in any way prevent or interfere with the full enjoyment by you of the rights hereby acquired.

We agree and guarantee to defend, indemnify and hold you harmless against any losses, damages, expenses or judgments which may be sustained or suffered by or secured against you by reason of any infringement of any copyright or any literary, dramatic or motion picture rights on account of any use which you may make of such work in the making of any motion picture versions thereof, the distribution, exhibition or other disposition of such motion picture versions, or the exercise or attempted exercise of any of the rights hereby granted, to the extent of our pro rata interest in the monies paid us under this agreement.

* * *

4. In case there shall be any renewals or extensions of the United States Copyright in such work or in any part thereof, then you shall be deemed to have acquired under

any and all such renewed or extended copyrights, all the rights in such work which have herein been granted, sold, assigned and set over to you, and if requested by you, we agree to execute or cause to be executed, any instruments that may be necessary, proper or expedient to establish the vesting in you of such rights during such renewed or extended period.

• • •

WILLIAM ANTHONY MCGUIRE (L.S.)

ALBERT LEWIS

GUS KAHN
By JOSEPH P. BICKERTON JR. (L.S.)

LEWIS & GORDON
By ALBERT LEWIS
MAX GORDON

WALTER DONALDSON
WALTER DOUGLAS atty (L.S.)

OWEN DAVIS (L.S.)
SAM H. HARRIS (L.S.)
ROBERT H. DAVIS (L.S.)

JULIA A. JACOBS
By ROBERT H. DAVIS
Attorney-in-Fact

ADELIA B. GILBERT
By ROBERT H. DAVIS
Attorney-in-Fact

W. A. M. PERSONNEL, INC.
By A. L. BERMAN
Treasurer

Approved
JOSEPH P. BICKERTON JR.

WALTER DONALDSON (L.S.)
FLORENZ ZEIGFELD
By JOSEPH P. BICKERTON JR. atty in fact
By STANLEY SHARPE atty in fact

Accepted:

• • •

SAMUEL GOLDWYN (L.S.)

Defendant's Exhibit EE

(ADMITTED AT PAGE 228, 294 OF RECORD)

Excerpts

THIS AGREEMENT, made and entered into this 8th day of April, 1928, by and between *Fox Film Corporation*, a New York corporation, party of the first part, *Donaldson, Douglas & Gumble, Inc.*, a New York corporation, party of the second part, *Walter Donaldson* and *Edgar Leslie*, both of the City of New York, parties of the third part, and *DeSylva Brown & Henderson, Inc.*, a New York corporation, party of the fourth part, . . . (1929 is the correct date of the agreement instead of the typographically-in-error 1928).

* * *

SECOND: The party of the first part hereby employs the parties of the third part and the parties of the third part, enter the employ of the party of the first part, to render their exclusive services to the party of the first part, as writers of lyrics, songs and musical compositions, for a term of twelve (12) weeks, beginning June 15, 1929, or not later than June 20, 1929, on which date the parties of the third part are to report at the studio of the party of the first part, at Los Angeles, California.

* * *

THIRD: The party of the first part shall pay to each of the parties of the third part, as compensation for the services to be rendered by each of them herein, the sum of Five Hundred ($500.) Dollars per week, during the term of said employment, provided, however, that the said salary shall not be paid during the inability or failure of the parties of the third part, or either of them, to perform, according to the terms and conditions hereof, the services contracted for herein.

* * *

Defendant's Exhibit EE

FIFTH: That the parties of the third part, shall during the term of the employment hereby created, devote their services exclusively to writing, composing and creating lyrics, songs and musical compositions, as the party of the first part shall direct, in accordance with the ideas of and at the times and places required by its duly authorized representatives, and that such services shall be rendered in a conscientious, artistic and efficient manner, to the best ability of the parties of the third part and each of them; and the character and type of said services and the manner of rendition thereof, are to be governed entirely by the party of the first part.

SIXTH: That the services of the parties of the third part herein contracted for are of a special, unique, unusual, extraordinary and intellectual nature, and of great and peculiar value to the party of the first part, and that their loss could not be reasonably or adequately compensated by pecuniary damages, and that the talents and services of the parties of the third part cannot be replaced by the party of the first part and the party of the first part is hereby given and granted the exclusive right and property in and to the services and in and to the use thereof. That the parties of the third part will not, during the term of the employment hereby created, engage with any other Producer of motion pictures or render any service or services of any kind or nature whatsoever, either for themselves or for and on account or benefit or to any person, firm or corporation, other than the party of the first part, either within or outside of business hours. In the event of a breach of this contract by the parties of the third part, or either of them, the party of the first

part shall be entitled to equitable relief by way of injunction or otherwise.

* * *

FOX FILM CORPORATION

By JACK G. LEO
Vice President

DONALDSON, DOUGLAS & GUMBLE, INC.

By WALTER G. DOUGLAS, Vice Pres.

WALTER DONALDSON (L.S.)

By WALTER DOUGLAS atty in fact

EDGAR LESLIE (L.S.)

By WALTER DOUGLAS atty in fact

DE SYLVA, BROWN & HENDERSON, INC.

By ROBERT [illegible]
President

Excerpts From Testimony

CHARLES SCHWARTZ, called as a witness by the plaintiff, being first duly sworn, testified as follows:

(R. 135-137) *Direct Examination by Mr. Dreyer*

Q. Did you represent Samuel Goldwyn in connection with the purchase by him of motion picture synchronization rights of a play entitled Whoopee? A. I may have. We represented Mr. Goldwyn generally and the probabilities are I acted for him in that connection.

Q. I show you Plaintiff's Exhibit 9 and ask you if you drew this document for Mr. Goldwyn? A. I don't see my handwriting on it, but I may have.

I may have represented him on this matter, but we had a staff of men in the office and it may be one of the other men took care of this. This is 1929, over 35 years ago, and it is pretty hard to remember.

Q. I show you a copy of a letter and ask you—

The Court: Mark it, please.

(Plaintiff's Exhibit 13 marked for identification.)

Q. Mr. Schwartz, I show you Plaintiff's Exhibit 13 for identification and ask you if this refreshes your recollection as to your representation of Mr. Goldwyn and the drawing of that contract, No. 9? A. I would think that I dictated this letter, my initials are on the side.

The Court: Listen to the question, Mr. Schwartz. Strike the answer.

Having read that letter, is your recollection refreshed as to whether or not you prepared that agreement? A. I would think so, yes, sir.

• • •

Q. At that time, were you still representing Donaldson, Douglas & Gumble, Mr. Schwartz?

* * *

A. I don't recall, it is so many years ago, over 35 or 36 years ago. I don't remember whether we did represent Donaldson, Douglas & Gumble at that time or not.

Q. You don't remember? A. I don't remember.

CHARLES SCHWARTZ, called as a witness for the defense, testified as follows:

Direct examination by Mr. Chopnick:

* * *

(R. 141) Q. Do you remember what the three gentlemen had indicated to you as the arrangements among themselves? A. I have no independent recollection, except in so far as my files show what the arrangement was. I have my file with me. If you would like to see it, you may. I have shown it to you and the other side before.

* * *

(R. 142) Q. You were asked to prepare an agreement which was in the nature of what is called a promotional preincorporation agreement. A. Yes.

Q. You did prepare a draft of that agreement. A. Yes, sir.

Q. Did you then have a meeting with the three gentlemen on your draft? A. I don't recall any meeting, but there must have been some discussions about it because there were changes made in the draft.

* * *

(R. 147) Q. Were you advised as to whether their services were to be exclusive? A. According to the papers, yes.

Charles Schwartz—for Defendant—Redirect

Q. During—

The Witness: Your Honor, I must state that I have no independent recollection.

* * *

(R. 154) The Court: There is no question from the document that Gumble and Douglas were labeled employees. Would you consider Donaldson an employee of this corporation?

The Witness: Well, I have no recollection, once again, as to what the parties intended. As I read the document, what he wrote belonged to the company, so the ordinary arrangement would be that he would be an employee. The contract says that the publication, as I remember the document, the publication and the mechanical rights belong to the enterprise. He made an assignment forever. They all belong—

* * *

Redirect examination by Mr. Chopnick:

(R. 162) Q. Which may explain the absence of the word "renewal"? A. I don't know, I don't know what was in my mind at the time.

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OCTOBER TERM 1967

No. 680

BREGMAN, VOCCO AND CONN, INC.,
Petitioner,

—against—

DONALDSON PUBLISHING CO.,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

FREDERICK W. R. PRIDE
LEO P. LARKIN, JR.
GUY C. QUINLAN
200 Park Avenue
New York, New York 10017

MAX CHOPNICK
9 East 46th Street
New York, New York 10017

Attorneys for Petitioner Bregman, Vocco and Conn, Inc.

ROYALL, KOEGEL, ROGERS & WELLS
CONNER & CHOPNICK
JEROME E. MALINO
THEODORE R. JACKSON

Of Counsel

PETITIONER'S REPLY BRIEF

Although Respondent concedes that the decision below is of "compelling importance to the music industry", its brief has failed to meet, and indeed has largely ignored, Petitioner's principal arguments with respect to the issues presented.

1. **As to Rule 52 (a).** The first issue presented by the Petition is whether it was error for the Court of Appeals to reject the "clearly erroneous" test prescribed by Rule 52(a), when the trial court, in order to reach its decision, necessarily drew inferences from evidentiary facts, evaluated disputed oral testimony and interpreted ambiguous evidence.

Respondent, in Point I of its brief, attempts to evade this issue by claiming that the Court of Appeals either passed solely upon a question of law or merely corrected the trial court's application of a legal standard to undisputed facts and documentary evidence.

This claim is unsupported by the record or by any statement in the Court of Appeals' opinion. Moreover, Respondent, in order to make the claim, has necessarily ignored entirely, in Point I of its Brief, the content and even the existence of all oral testimony adduced at trial.

The fact is that both the District Court and the Court of Appeals regarded the nature of Donaldson's relationship to Petitioner—i.e., whether or not Petitioner had been Donaldson's "employer for hire"—as a question necessarily involving an evaluation or interpretation, not only of the preincorporation and employment agreements, but also of other documents, testimony and surrounding circumstances. Among others, these included:

(a) The minutes of the first meeting of the Board of Directors, initialed by Donaldson, which referred to Donaldson's agreement with Petitioner as an employment contract;

(b) The oral testimony of Douglas, the only surviving party to the original agreement, that the parties intended "employment";

(c) The oral testimony of Schwartz, the attorney who drafted the documents, who stated that he understood the agreement to be one of "employment";

(d) Powers' testimony that Donaldson himself regarded his agreement with Petitioner as an "employment contract"; and

(e) The subsequent acts of the parties insofar as relevant to their intent, and inferences to be drawn from those acts, such as that Donaldson had bound himself to compose for Petitioner "exclusively"; that Petitioner was given the right to, and did, copyright Donaldson's compositions in its own name; that Donaldson never reserved or asserted any rights in such copyrights; that Donaldson was to and did serve as the President of the Petitioner in addition to being an owner of one-third of its stock; and that Donaldson was to receive a fixed weekly compensation, which was payable to him regardless of whether any of his compositions ever earned a penny in royalties.

In the light of these considerations, Respondent's reliance on *In re Hygrade Envelope Corp.*, 366 F. 2d 584 (2d Cir. 1966), is obviously misplaced, since *Hygrade* involved no factual issues. The trial and appellate courts were there concerned with the formulation of a legal standard of care applicable to creditors in bankruptcy cases where the facts were undisputed. Even so, the Second Circuit observed that its view as to the inapplicability of Rule 52(a) in such circumstances was in conflict with the view of other circuits, saying (p. 589):

> "The Security-First Nat. Bank holding is indeed consistent with the Ninth Circuit's general view that a judge's decision on the issue of reasonable care is a finding of fact protected by the 'unless clearly erroneous' rule, see Pacific Tow Boat Co. v. States Marine Corp., 276 F. 2d 745, 752 & n. 12 (9 Cir. 1960), and cases cited. But we have adhered to our long held contrary position in face of that court's disapproval, [citations omitted] and have reaffirmed our view as recently as Mamiye Bros. v. Barber S. S. Lines, Inc., supra."

The authorities cited at page 14 of Respondent's brief are all inapposite to the issues here posed. *United States Gypsum Co.* and *Parke Davis & Co.* were antitrust cases, where the issue was whether as a matter of law certain admitted business practices violated the Sherman Act. *Baumgartner* was a denaturalization case, in which this Court reversed because of the Government's failure to meet a standard of proof peculiar to a case involving the "duties and immunities of citizenship". *Beyer* v. *LeFevre* merely held that a jury verdict could be set aside where it was "wholly unwarranted" by the evidence. *Skelly Oil* presented an issue of law as to proper administrative procedures under the Natural Gas Act, and *Mamiye,* like *Hygrade,* involved the formulation of a legal standard of care in relation to undisputed facts. None of these cases dealt even remotely with the applicability of Rule 52(a) to the resolution of factual issues turning upon an evaluation of disputed oral testimony or an interpretation of ambiguous evidence or inferences drawn from evidentiary facts—elements all present in this case.

We submit that Respondent's efforts to excuse the Court of Appeals' express refusal to adhere to the mandate of Rule 52(a) are without substance. And by rejecting that

Rule, the Court of Appeals plainly exceeded the power of review with which it is vested.

We repeat that this is a clear case in which this Court should exercise its supervisory jurisdiction to require compliance with and uniformity in the application of the rules governing appellate review. Particularly is this so when the Second Circuit has directly stated, in indulging in its propensity to "free" itself from the limitations of the Rule, that its position as to the application of the Rule is in conflict with that of the Ninth Circuit (*See Hygrade, supra,* p. 2).

2. **As to Respondent's treatment of the evidence.** In Point II of its brief, Respondent argues in essence that the findings of the District Court were "clearly erroneous", even though the Opinion of the Court of Appeals did not characterize them as such. We do not propose in this reply brief to answer each of Respondent's arguments as to the import which should attach to various aspects of the evidence.

Respecting the language of the Donaldson employment agreement (Resp. Br. pp. 16-18), we have dealt *in extenso* in our Petition with the genesis and meaning of that document. Respecting the claims predicated on the nature of Donaldson's compensation and the absence of any contractual provisions dealing with "control"*, our earlier discussion of these points needs no elaboration. We do think that it is of the utmost significance, in the light of the real issues here raised, that Respondent's references to the "oral testimony" (Resp. Br. pp. 21-22) simply represent attacks "upon the probative value" of the testimony of the witnesses —testimony which was considered and evaluated by the trial court.

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*It is clear from the evidence that Donaldson was not "free" to render services to others, and Respondent does not dispute that, in the few instances in which Donaldson wrote songs for others, the arrangements were made by and with the consent of the Petitioner.

Furthermore, and contrary to Respondent's contention, none of that testimony was in conflict with the documentary proof—but directly supported the trial court's interpretation of that proof. It was completely consistent with the use of the word "employment" in Donaldson's agreement with Petitioner. And none of Respondent's efforts to belittle the importance of the use of that word, nor the rationalization of the Court below as to its meaning, can detract from its compelling significance.

In sum, we urge that Respondent's own argumentative treatment of selected portions of the record and its attack on the credibility of the witnesses negate its claim that the Court of Appeals reversed solely on an issue of law. Rather, they underscore the fact that the District Court based its decision on a determination of sharply disputed issues of fact and demonstrate that its findings were amply supported by the record.

If the Court of Appeals had agreed with Respondent that the findings of the District Court were "clearly erroneous", we think it manifest that it would have so held. And certainly Respondent offers no explanation of why the court failed to do so, and deemed it necessary, instead, expressly to decline to follow Rule 52(a).

3. **The nature of Petitioner's rights.** Even though the evidence establishes no reservation of rights by Donaldson, Respondent argues, in Point III of its brief, that Petitioner was a mere licensee. This is said to be so because the publication and mechanical rights were the only rights specifically referred to in Petitioner's contract with Donaldson.* It is obvious, however, that these two principal sources of copyright revenue were specifically referred to for the purpose of measuring the precise royalties to which Donaldson,

*It should be noted that when the contracts in question were executed in 1928, publication and mechanical rights were the major rights as then known for the development of revenue from the exploitation of musical compositions.

his heirs and successors were to be entitled during the original and renewal terms of the copyrights, by virtue of Donaldson's services to Petitioner.

Respondent also argues in Point III that Petitioner, as the mere licensee of publication and mechanical rights, held all copyrights in trust for Donaldson. This argument, however, simply begs the question, since Petitioner would hold the copyrights in trust for Donaldson only if (a) it were not Donaldson's "employer for hire" and (b) the "corporate body" provision of Section 24 were inapplicable.

4. **As to the "corporate body" provision of Section 24.** The Court of Appeals asserted in its opinion that the "corporate body" provision of Section 24 of the Copyright Act was infrequently invoked, limited in scope, and not entirely plain. Respondent goes further: Point IV of its brief is premised on the claim that the provision is "for all practical purposes, meaningless". Respondent even asserts (quite erroneously) that the authorities unanimously share its view.

This premise ignores the well-settled principle that Congress cannot be presumed to have used words without meaning, and that effect should be given, wherever possible, to every statutory provision (*See, e.g., Ginsberg & Sons* v. *Popkin,* 285 U. S. 204, 208). It also ignores or overlooks the significant fact that the same statutory language appears in the proposed new Copyright Act. H. R. 2512, § 304(a). As to this, Respondent's statement that the provision in question has been "eliminated" from the proposed statute is seriously misleading. Obviously, the "corporate body" language was eliminated as to *new* works because the proposed statute does not provide for renewals of copyright to such works.

Respondent does not even purport to meet Petitioner's main arguments as to the applicability of the "corporate body" provision. Instead, it suggests, again inaccurately, that the provision should not apply because the parties sought to fix their rights by express contract, although not

one word with respect to renewal rights appears in any of the documents contained in the record.*

Moreover, Respondent simply obscures the issue when, at various points in its brief, it refers to the fact that Petitioner, in applying for registration of its copyrights, described Donaldson as the "individual author". While a corporation can, for Copyright Act purposes, be an "author" and thus acquire copyright ownership, including renewal rights, it is obviously never the "individual author" of a literary or musical work within the ordinary meaning of those words. The references to Donaldson in the Copyright Office application forms for registration of copyright were merely descriptive of who wrote the music and obviously have no more proprietary import than the credit lines in the opening frames of a motion picture. They are in no way inconsistent with Petitioner's position that it is "the author" within the meaning of 17 U. S. C. § 24.

Respondent's treatment of the "individual author" point is one example, among many, of its preoccupation with detail and its correlative refusal to come to grips with Petitioner's arguments as to why the "corporate body" provision of Section 24 should here apply. Contrary to Respondent's assertion that the authorities unanimously view the provision as "meaningless", Copyright Office Study No. 31 (1960) cites the following as one of several situations when the provision should apply:

> "A work written by an official or a major stockholder of a corporation, where the work was written directly for the corporation but not as an employees [sic] for hire."**

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*The absence of any reference to renewal rights is of course consistent with and corroborative of Petitioner's position that it was Donaldson's employer for hire. As such, Petitioner was the owner of the renewal as well as the original copyrights, and there was no need, therefore, to refer to renewal rights in the employment agreement.

**Study No. 31, prepared for the Senate Judiciary Committee as part of the copyright law revision series, p. 137, fn. 215.

Petitioner pointed out (Petition, p. 31) that, assuming, *arguendo,* Donaldson were not an "employee for hire", the foregoing example fits precisely the undisputed facts of this case. To this Respondent has made no reply.

CONCLUSION

Apart from our belief that the decision below is erroneous, we have petitioned this Court because that decision represents an unjustified precedent of extreme significance in the field of copyright law, generally, and was predicated on a misconception of the power of the Court of Appeals to reject the mandate of Rule 52(a) which is in conflict with the decisions of other Circuits and of this Court. Nothing Respondent has said derogates from the importance, procedurally and substantively, of the issues presented. For the reasons set forth herein and in the Petition, we again submit that the Writ of Certiorari should be granted.

Respectfully submitted,

FREDERICK W. R. PRIDE
LEO P. LARKIN, JR.
GUY C. QUINLAN
200 Park Avenue
New York, New York 10017

MAX CHOPNICK
9 East 46th Street
New York, New York 10017

Attorneys for Petitioner Bregman, Vocco and Conn, Inc.

ROYALL, KOEGEL, ROGERS & WELLS
CONNER & CHOPNICK
JEROME E. MALINO
THEODORE R. JACKSON

Of Counsel